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In the Supreme Court of the United States

October Term, 1992

ROBERT TAYLOR and TIMOTHY COTTON
Petitioners,

v.

FLORIDA ATLANTIC UNIVERSITY, HELEN POPOVICH, KENNETH MICHELS, DENNIS NICEWANDER, DON GARDNER, MARILYN FLOYD, LEONARD BERRY, and ANTHONY CATANESE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

JAMES K. GREEN
One Clearlake Centre
250 Australian Ave. S.
Suite 1300
W. Palm Beach, FL 33401
(407) 659-2009

M. DAVID GELFAND*
TERRY E. ALLBRITTON
KENNETH J. SERVAY
Appellate Advocacy Program
Tulane Law School
6801 Freret Street
New Orleans, LA 70118
(504) 865-5732, 865-5965

Counsel for Petitioners

**Counsel of Record*

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 1983 requires proof of intent to violate a plaintiff's rights?

2. Whether the First Amendment imposes an intent requirement on those seeking redress for a conspiracy to violate their free speech rights?

3. Whether the courts below misinterpreted the Federal Rules of Evidence by refusing to admit expert testimony regarding the pattern and practice of retaliation against whistleblowers for exercise of First Amendment free speech rights?

LIST OF INTERESTED PARTIES

The parties to the proceeding below were petitioners, Robert Taylor and Dr. Timothy Cotton, and respondents, Helen Popovich, Kenneth Michels, Dennis Nicewander, Don Gardner, Marilyn Floyd, Leonard Berry, Anthony Catanese, and Florida Atlantic University ("FAU"). FAU is a public university of the State of Florida under the Florida Board of Regents. All of the individual respondents were sued in their official and individual capacities, except for respondent Catanese, who was sued in his official capacity only, being substituted on April 12, 1991, for respondent Popovich in her official capacity. None of the petitioners are corporations subject to the requirements of Supreme Court Rule 29.1.

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Petitioners, Robert Taylor and Dr. Timothy Cotton, ask this Court to grant their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this civil proceeding on September 29, 1992.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit, entered without a written opinion, is referenced at 976 F.2d 743 and is reprinted in the appendix hereto at 1a. The judgment and rulings below that are the subjects of this petition are unpublished. They are reprinted in the appendix at 3a-22a.

JURISDICTION

Petitioners Taylor and Cotton filed this civil rights action on January 30, 1989, in the United States District Court for the Southern District of Florida. Petitioners invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983, seeking monetary damages and declaratory and injunctive relief for the violation of their free speech rights as guaranteed by the First and Fourteenth Amendments to the United States Constitution. The United States District Court, Hon. James C. Paine, entered final judgment in favor of respondents on May 17, 1991. *See* Appendix 3a. Petitioners then filed timely post-judgment motions on May 23 and 28, 1991. The district court denied these motions on May 28, 1991 and other post-trial motions on July 31, 1991.

Petitioners invoked the appellate jurisdiction of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1291, by timely filing their notices of appeal with the district court on June 14, 1991, and August 22, 1991. On September 29, 1992, the court of appeals affirmed the district court's judgment. *See* Appendix, 1a. Justice Kennedy, on behalf of this Court, granted petitioners an extension until January 27, 1993, to file this petition. *See* Application A-435 (Dec. 1, 1992). Petitioners now file this petition pursuant to 28 U.S.C. §§ 1254(1), 2101(c), and the rules of this Court.

STATUTES INVOLVED

The following provisions of the Constitution of the United States are implicated in this case: U.S. Const.,

Amendments I and XIV. This case also implicates 42 U.S.C. §1983 and Fed.R.Evid. 701-705. The full text of these provisions is reproduced in the appendix, 23a-25a.

STATEMENT OF THE CASE

A. Introduction

This case involves the wrongful discharge of a state university's employees for exercising their core First Amendment rights. Petitioners Taylor and Cotton contend that they were discharged from their positions at Florida Atlantic University [hereinafter FAU], after more than 30 years of combined service, because of their whistleblowing activities. Respondents are FAU, its President, and other key officials of this state university. FAU discharged Taylor and Cotton after they exposed, to regulatory officials and the public, the improper spending of public funds.

This First Amendment "whistleblower" case raises important questions concerning the elements of a claim under 42 U.S.C. § 1983. The courts below, over petitioners' objections and in direct contravention of the rulings of this Court and several circuits, ruled that a plaintiff must prove that state officials, in taking adverse employment action, *intended* to violate plaintiff's constitutional rights. This ruling seriously infringes upon these and other plaintiffs' exercise of their First Amendment rights by allowing defendants to disguise constitutional violations as unactionable reckless or negligent acts.

This case also eviscerates a plaintiff's right to use expert witnesses to establish the pattern of the constitutional violation. Contrary to the plain meaning of the Federal

Rules of Evidence and established jurisprudence interpreting the rules, the courts below held that a plaintiff may not use expert witnesses to establish the modus operandi of a First Amendment retaliatory firing. This ruling chills free speech by preventing plaintiffs from proving the common pattern of such unconstitutional action.

In addition to their deleterious impact on the present case, the rulings below seriously erode well-established First Amendment guarantees under the guise of procedural decisions. Petitioners believe that the important constitutional implications of the underlying rulings compel the grant of their petition.

B. The Facts

Petitioner Robert Taylor began working at FAU in 1971 as a Computer Systems Analyst. Between his employment in 1975 and 1985, he was promoted several times with each promotion involving substantial raises and increases in supervisory authority. After his promotion to Associate Director of Academic Computing in 1985, Taylor's responsibilities included reviewing and recommending approval or disapproval of any FAU computer purchases.

In November 1985, Taylor disapproved a purchase from Gulfstream Micro Systems [hereinafter Gulfstream] of computer equipment ordered by the Dean of the FAU College of Business because: (1) it had not been competitively bid, as required by state regulations; and (2) Taylor believed that Gulfstream employed faculty members of the College of Business. Taylor's decision was reviewed

by respondent Dennis Nicewander, the FAU Vice-President of Administrative Affairs, who approved the purchase.

Upon further investigation during the spring and summer of 1986, Taylor and others discovered numerous additional improprieties and apparent illegalities in purchasing procedures used by certain FAU staff and administrative personnel, which had resulted in overpayment of public funds. These improprieties included: (1) purchase of nine personal computers; (2) acquisition of mobile homes; (3) purchase of travel agency services; and (4) failure to impose physical property controls, all in violation of Florida State Purchasing Regulations. Auditor Harvey Sweeney testified that FAU paid more for the Gulfstream equipment than it would have paid for equivalent equipment under an existing state contract.

Taylor reported the improper Gulfstream computer purchase to FAU's Computer Advisory Committee. He was told curtly that the Gulfstream purchase was none of his concern. He then shared the information with Dr. John Munson, a trusted friend who was Chairman of the FAU Computer and Information Resources Department, and with petitioner Dr. Timothy Cotton, a fellow employee who was then a Computer Systems Coordinator. The three men agreed that Dr. Munson would approach the Administration with Taylor's discovery, as Munson's tenure would protect him if the Administration were to react in a hostile manner. Dr. Munson, as Taylor's intermediary, then approached the Administration, which effectively ignored the purchasing violations uncovered by Taylor.

In September 1986, Munson approached the Palm Beach County State Attorney's Office with Taylor's

findings. At first, Taylor's and Cotton's identities were concealed. Eventually, Taylor cooperated with Investigator Tim Valentine of the State Attorney's Office, because Taylor was the most knowledgeable about the improprieties. Valentine's extensive investigation, aided by Taylor, uncovered evidence sufficient to warrant turning the investigation over to Harvey Sweeney, Internal Auditor Director of the Florida Board of Regents. In October 1986, Sweeney asked Cotton and Taylor to participate in his investigation of the spending improprieties at FAU.

On October 9, 1986, respondent Provost Michels told Taylor that the Administration was aware that Taylor had assisted the State Attorney's investigation at FAU. Michels threatened Taylor, stating that people could be fired for giving out information about the University.

On October 30, 1986, Internal Auditor Director Sweeney and the State Attorney issued a joint report concluding that there had been improper allocation of resources, poor management, inadequate supervision, and circumvention of normal procedures by academic and administrative personnel in acquiring and receiving goods. Following this report, Respondent Helen Popovich, the President of FAU, called a cabinet meeting at which both Taylor and Munson were present. Popovich stated that there was no problem and then ended the meeting. Taylor then discussed further approaches with Cotton, Munson, State Investigator Valentine, and Internal Auditor Director Sweeney.

Valentine suggested that public scrutiny might afford Taylor some protection from a vindictive Administration. After considering this and other advice, Taylor spoke to the

press, as Dr. Munson had done previously. Also, Cotton eventually was approached by and spoke to the press.

Following the publicity generated by the press interviews of Munson, Cotton and Taylor, respondent Nicewander distributed a "gag rule" memorandum to FAU personnel prohibiting them from speaking to the press and instructing them to direct all media inquiries to an administrative spokesperson. Nicewander testified that this memo was issued to keep the press from distracting FAU employees. However, Adelaide Snyder, then FAU Vice President in charge of media relations and one of Popovich's closest advisors, testified that Nicewander's "gag rule" memo was issued to prevent Cotton and Taylor from further speaking with the press.

Shortly after the press reports, Ms. Snyder attended several "cabinet" meetings where some respondents, *i.e.*, the highest officials at FAU, plotted to fire Taylor and Cotton for their whistleblowing. She testified that firing Taylor and Cotton was the only topic discussed at several meetings in late 1986 (even though the respondents were responsible for operating a large University). She described one such meeting at which respondents Popovich, Michels, and Nicewander all agreed that creating a "paper trail" of poor job performance would be the best way to justify firing Taylor and Cotton for their whistleblowing. Ms. Snyder also heard Nicewander say that the sooner Taylor and Cotton were gone the better. She testified that Popovich thought removing Taylor and Cotton was the best "solution" to the problems at FAU. Accordingly, those three respondents instructed their employees, including Cotton's and Taylor's superiors, to create this "paper trail." While Popovich initially testified that Cotton and Taylor were never

mentioned during the cabinet meetings, on cross-examination, she admitted that Taylor was the subject of a cabinet meeting in 1986. At one point, respondent Michels said that the FAU cabinet felt besieged by the intensely critical media coverage.

On December 6, 1986, respondents Michels and Nicewander resigned from their respective positions as FAU Provost and Vice President. (Respondent Popovich resigned in the summer of 1989.) Six months after Michels resigned as Provost, respondent Leonard Berry was appointed as Provost and Vice-President of Academic Affairs. The evidence shows that Berry also adopted Michels' crusade to rid FAU of Taylor and Cotton. Berry told Dr. James Sycamore, an FAU professor and Provost of FAU's Broward facility, that Taylor and Cotton were going to be fired for their whistleblowing.

In 1987, after the FAU mismanagement had been publicized, Taylor received his first written counseling notes in more than two years from William King, his immediate superior. King's previous suggestions concerning Taylor's job performance had been delivered orally, face-to-face. In August 1986, before disclosure of Taylor's discovery of purchasing improprieties, Taylor had received the largest pay raise in his department for his outstanding work and contributions to the Academic Computing Department. After his whistleblowing, Taylor received the smallest pay raise in his department.

FAU's retaliation against Taylor and Cotton continued in 1988. In February 1988, King notified Taylor that Taylor was being transferred to FAU's Broward County campus. Taylor, believing that the transfer was a

punishment for his whistleblowing, took his opposition to President Popovich. Popovich rescinded Taylor's transfer after consulting with counsel.

As Dr. Cotton was in charge of academic computing at the FAU Broward campus, Taylor's possible transfer interested him, but King never discussed Taylor's transfer with Cotton. Dr. Cotton vigorously and vocally opposed that transfer and sent memoranda to King evidencing his opposition. During a conversation on the subject, King told Cotton that Cotton's own position was going "to roll out in July." Dr. Cotton considered this comment a warning that continued opposition to the transfer would jeopardize his own job.

FAU's retaliation against petitioners also surfaced in connection with the planned merger of the university's administrative and academic computing departments. This merger, originally planned while King was petitioners' supervisor, did not take place until after July 1988, after King had left the university. Snyder testified that she was present at cabinet meetings where respondents Popovich, Michels and Nicewander agreed that the person hired to replace King would be told that part of his job was to fire Cotton and Taylor. FAU hired respondent Gardner in 1988 to fill this position. While Gardner was interviewing for the job, respondent Marilyn Floyd, King, and Colter told him that Taylor had been a personnel problem. Gardner testified that King "was very negative about Tim Cotton at that point." Even before Gardner's office had been furnished, he had a conversation with Ms. Snyder concerning her knowledge about the plan to terminate Cotton and Taylor. Gardner told Ms. Snyder that he knew

his superiors wanted Cotton and Taylor fired, and that he would be better off if he sacked them.

Taylor and Cotton, as heads of important sections within the computer department, believed that newly arriving Gardner would be interested in discussing their ideas concerning the pending merger of academic and administrative computing. Taylor compiled a list of questions and discussion topics in anticipation of meeting with Gardner. To his surprise, Gardner was uninterested in anything Taylor had to say regarding computer operations. A few days later, Gardner gave Taylor a terminal contract. Thus, after nearly 15 very successful years at FAU, Taylor had just one year to work at FAU. During his terminal year, Taylor's previously substantial responsibilities were drastically reduced. The 20 or so employees who had reported to Taylor were removed from his supervision, and his office was moved from the center of the Academic Computing area to a remote corner of the department.[1]

Dr. Cotton, likewise expecting Gardner to be interested in his views, compiled a list of 20 questions as a topical guide in his conversation with Gardner; he even sent the list to Gardner a few days before their meeting. Again, however, Gardner had his own agenda, so he largely ignored Cotton's list. As with Taylor, Gardner issued Cotton

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[1] Following his final days at FAU, Taylor searched exhaustively for new employment. Despite his efforts, Taylor has been unable to acquire work consistent with his training and experience. At the time of trial, Mr. Taylor worked as a bookstore clerk, earning $4.50 per hour.

a terminal contract less than a week after their meeting. Dr. Cotton had worked at FAU for nearly 15 years.

Taylor and Cotton were the only administrative and professional employees whose contracts were not renewed as a result of the reorganization. Though Popovich testified that Cotton was asked to leave "because there was widespread user dissatisfaction of [sic] the quality of his work," Gardner explained that Taylor's and Cotton's nonrenewal was unrelated to their performance. Both proffered and accepted testimony confirmed Gardner's statement.

Petitioners proffered crucial testimony by Thomas Devine, a national expert on whistleblowing who had testified in three prior whistleblowing cases. Devine would have testified regarding the pattern of retaliatory conspiracy in this case as compared to other whistleblowing cases. He would have explained that the conduct of respondents and King in this case was wholly consistent with the usual individual and institutional response to whistleblowers.[2] Persons criticized by a whistleblower do not themselves act directly. To avoid the appearance of retaliation, they choose an outside party to eliminate the whistleblower. That is precisely what happened in this case. As Ms.

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[2] The District Court excluded this expert testimony based upon its reading of Fed.R.Evid. 701, 702, and 703. In particular, Judge Paine believed that the requirements of Fed.R.Evid. 702 were not met, and that the subject matter of the testimony was not "scientific" enough to warrant expert testimony. *See* Part II, below.

Snyder testified, Respondents sought to develop a new written record -- a "paper trail" -- to explain their discharge of Cotton and Taylor. Devine also would have testified that time lags between the whistleblowing and the discharge of the whistleblower are more consistent than not with a retaliatory response.

Devine's proffered testimony would have demonstrated that Taylor's proposed transfer, and Cotton's negative reaction to it, were typical methods of retaliation against whistleblowers. Whistleblowers are regularly isolated, criticized or pushed in various ways to the point where they are so frustrated that they write inappropriate memoranda or try to embarrass a superior.

C. Course of Proceedings and Disposition in the Courts Below

On January 30, 1989, petitioners Taylor and Cotton filed their complaint in the United States District Court for the Southern District of Florida against respondents FAU, Popovich, Michels, Berry, Nicewander, Floyd, and Gardner, seeking declaratory and injunctive relief and compensatory and punitive damages. The complaint alleged that the individual respondents acted individually and in concert to fire Taylor and Cotton for exercising their First Amendment rights in criticizing respondents in their official capacity as University administrators.

Respondents generally denied the allegations in their answers. On October 29, 1990, Taylor and Cotton moved for partial summary judgment, and later filed a second motion for summary judgment. Several respondents subsequently filed motions for partial summary judgment.

On April 19, 1991, the district court granted partial summary judgment on various issues in favor of some of the parties and denied the remainder of the summary judgment motions, leaving those issues for trial. The case was tried to a jury, beginning on April 23, 1991.

Importantly, before trial, the district court found that several of petitioners' statements were protected by the First Amendment. Specifically the district court ruled that Taylor's comments to newspapers, to Investigator Valentine, and to Auditor Sweeney concerning procurement fraud at FAU were protected; that Cotton's comments to newspapers criticizing the FAU administration were protected; and that Cotton's nomination of Taylor for a Distinguished Service Award, and his public support of Taylor were protected.[3] *See* Omnibus Order on Motions for Directed Verdict, Appendix, 7a-15a.

During the jury trial, petitioners offered Thomas Devine as an expert on whistleblowing. However, the district court refused to allow Devine to testify based on its reading of the Federal Rules of Evidence. *See* Part II, below. At the jury charge conference, the district court rejected petitioners' objection to the portion of the court's charge that required proof of intent as an element of a claim

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[3] However, the district court also ruled that other communications from Taylor and Cotton were not protected, including Cotton's 20 Question Memorandum and various communications regarding petitioners' concerns about FAU's responses to their conduct and possible retaliation. Petitioners contend that this speech also was protected by the First Amendment.

under 42 U.S.C. § 1983. *See* Part I, below. The court also refused petitioner's instructions regarding innocent intermediary, the continuing nature of conspiracies, and respondents' burden to prove withdrawal from the conspiracy.

On May 13, 1991, the jury returned a verdict for respondents. The district court entered final judgment on May 18, 1991. Appendix, 3a. On May 23, 1991, Taylor filed a motion for a new trial or for judgment n.o.v. The court denied Taylor's motion on May 28, 1991 (entered June 7). On May 28, 1991, Taylor and Cotton filed a motion for rehearing or clarification. On June 14, 1991, Taylor and Cotton timely filed their first Notice of Appeal. On July 31, 1991, the district court entered an order denying petitioners' May 28 motion for rehearing or clarification. Cross-appeals by various respondents were filed on August 13. On August 22, 1991, Taylor and Cotton filed a second timely Notice of Appeal.

On September 29, 1992, the Eleventh Circuit, after hearing oral argument, affirmed the district court's judgment without opinion. Appendix, 1a.

REASONS FOR GRANTING THE WRIT

I. The Decisions Below Substantially Impair § 1983 Redress for Violations of First Amendment Rights by Improperly Interposing Intent as an Element of the Claim

Respondents argue that since Gardner, the person who issued the termination contracts to petitioners, had no "intent" to violate petitioners' constitutional rights, none of

the respondents can be culpable under 42 U.S.C. § 1983. They reason that since Gardner either did not know of the whistleblowing retaliatory conduct of other respondents (*i.e.*, was an innocent intermediary) or refused to hear of it (*i.e.*, was recklessly indifferent), his termination of petitioners could not have violated § 1983. They further theorize that the "intent" of the other respondents is irrelevant since Gardner's lack of "intent" essentially cleansed petitioners' termination of any taint. Apparently influenced by respondents' intentional conduct theory, the district court, over petitioners' vehement objections, instructed the jury on liability under 42 U.S.C. § 1983 as follows:

> The law provides that a person may sue in this Court for an award of money damages against anyone who, under color of state law or custom, *intentionally* violates the plaintiff's rights under the Constitution of the United States.

Appendix, 17a. The district court overruled petitioners' timely objection that neither § 1983 nor the First Amendment require plaintiff to prove that respondents *intended* to violate petitioners' rights. Thus, this case squarely presents the question whether only intentional conduct can support a § 1983 claim.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court, in discussing its prior § 1983 cases, found that "[n]othing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights." 451 U.S. at 534. The *Parratt* Court noted that the statute does not contain a state of mind requirement and, accordingly, "'should be read against the

background of tort liability that makes a man responsible for the natural consequences of his action.'" *Parratt*, 451 U.S. at 535, *quoting Monroe v. Pape*, 365 U.S. 167, 187 (1961). Whether a § 1983 violation occurred depends on only two factors: (1) whether the conduct in question was committed by a person acting under color of state law; and (2) whether the conduct deprived a person of rights, privileges or immunities guaranteed by the Constitution or the laws of the United States. Thus, *Parratt* strongly implied, if it did not outright hold, that some degree of culpability less than intentional conduct can provide the basis for a § 1983 claim. *See also Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980). Therefore, the district court committed a serious error of law in instructing the jury that § 1983 required proof of intent.

Nor does the First Amendment burden plaintiffs with proving intentional conduct. In *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court enunciated the analysis to be applied in First Amendment retaliatory employment action cases: (1) plaintiff must show that his conduct is protected by the First Amendment and that this protected conduct was a substantial or motivating factor behind the adverse action taken against him; (2) if plaintiff satisfies this burden, the defendant, to avoid liability, must prove by a preponderance of the evidence that it would have reached the same decision even in the absence of plaintiff's protected conduct.

Guided by *Parratt* and *Mt. Healthy*, several federal courts have held that even negligent impairment of First Amendment rights is actionable under § 1983. *See Foley v. Alabama State Bar*, 648 F.2d 355, 359-60 (5th Cir. 1981); *Lowe v. Letsinger*, 772 F.2d 308, 314 (7th Cir.

1985); *Boussom v. City of Elkhart*, 567 F.Supp. 1382, 1387 (N.D. Ind. 1983).

However, in *Daniels v. Williams*, 474 U.S. 327 (1986), a prisoner's case, this Court reconsidered whether "mere negligence" will support a claim under § 1983. This Court held:

> In *Parratt v. Taylor*, we granted certiorari . . ."to decide whether mere negligence will support a claim for relief under § 1983." 451 U.S., at 532. After examining the language, legislative history and prior interpretations of the statute, *we concluded that § 1983*, unlike its criminal counterpart, 18 U.S.C. § 242, *contains no state-of-mind requirement* independent of that necessary to state a violation of the underlying constitutional right. *Id.*, at 534-35. *We adhere to that conclusion.*

Daniels, 474 U.S. at 329-30 (emphasis added). However, the Court added: "[i]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right." *Id.*, at 330. The *Daniels* Court "overrule[d] *Parratt* to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." *Id.*, at 330-31.

Daniels has caused some uncertainty among the lower federal courts concerning whether and when less than intentional conduct states a cause of action under § 1983. In particular, in § 1983 cases seeking redress for violation of First Amendment rights, the lower federal courts are divided.

Some cases have emphatically insisted that after *Daniels*, a less than intentional First Amendment violation will still support a claim under § 1983. *E.g.*, *Caballero v. City of Concord*, 956 F.2d 204 (9th Cir. 1992) (emphatically holding that § 1983 *does not* require proof of intent and that *Daniels* has no application to cases involving abuse of government power); *Livesay v. Dawson*, No. 90-6647, 923 F.2d 848 (table) (unpublished decision; text reported in WESTLAW) (4th Cir. Jan. 25, 1991) (official's negligent action does not state a violation of due process after *Daniels*, but negligent violation of First Amendment right of access to courts is actionable under § 1983).

Other cases also hold that *Daniels* did not change the § 1983 burden regarding First Amendment claims, but state this proposition with less certainty. *E.g.*, *Walker v. Tennessee Dept. of Corrections*, No. 90-5075, 924 F.2d 1060 (table) (unpublished opinion; text reported in WESTLAW) (6th Cir. Jan. 31, 1991) (cautiously distinguishing the negligent due process claim in *Daniels* from a First Amendment claim).

At least one court has suggested that a First Amendment claim requires proof of an intent to deprive plaintiff of his constitutional rights. *Haynesworth v. Miller*, 820 F.2d 1245, 1262 n. 132 (D.C. Cir. 1987). That court stated that "establishment of a First Amendment claim of retaliatory prosecution requires proof that a governmental official acted with intent to deprive the plaintiff of his First Amendment right." *Id.* However, even that court quickly added: "But once such a violation is established, we think an official charged with supervising the wrongdoer may be held liable for dereliction of duty regardless of whether he harbored an improper motive of his own." *Id.*

Arguably, the district court's jury charge and the Eleventh Circuit's affirmance in this case are consistent with the first part of the *Haynesworth* ruling that intent by an official is required to prevail on a First Amendment claim under § 1983. Yet, the charge is inconsistent with the *Haynesworth* recognition that other defendants may be liable who *do not* have an improper motive, as well as with the case law requiring no proof of intent.

This Court should grant this petition to decide the question definitively. This Court consistently has recognized that the First Amendment free speech guarantee is one of the most basic of the fundamental rights guaranteed by the Constitution. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 503-04 (1984); *Cohen v. California*, 403 U.S. 15 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Court has condemned conduct that promotes concealment of governmental wrongdoing and that has a "chilling effect" on the exercise of free speech aimed at uncovering that wrongdoing:

> The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.
>
> * * *
>
> Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health.

New York Times Co. v. United States, 403 U.S. 713, 723-24 (1971). In protecting this fundamental free speech right,

this Court has relaxed the standing requirement, *e.g.*, *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 483-85 (1989), and broadened the standard of review, *see Bose*, 466 U.S. at 499, 505-11, to assure a full, independent review of conduct alleged to have violated, or even threatened to have violated, this most basic of fundamental rights.

This case clearly involves speech that is protected by the First Amendment. Though it erred in finding some of petitioners' statements unprotected, the district court also specifically and correctly ruled that several statements made by Taylor and Cotton were protected by the First Amendment. This protected-speech finding was not challenged by respondents in the court of appeals.

The intentional standard of proof, such as suggested in *Haynesworth* and required by the jury instruction given in this case, is incorrect and inconsistent with this Court's First Amendment and § 1983 jurisprudence. It misdirected the jury's evaluation of respondents' reckless conduct in violation of petitioners' free speech rights. First, this Court's established case law, as discussed above, specifically provides that § 1983 contains no state of mind requirement. Thus, to tell a jury, as the district court did in this case, that under § 1983, a plaintiff must prove that defendant *intentionally* violated plaintiff's constitutional rights, is blatantly incorrect and erroneous. Second, that jury instruction cannot be defended by an assertion that the First Amendment requires proof of intent. This Court has never held that the First Amendment requires proof of intent. *Mt. Healthy*, discussed above. Nothing in *Daniels* or any other Supreme Court case, either expressly or implicitly, has added an intent requirement to the *Mt. Healthy* standard.

The split in the case law among the circuits should be resolved to make this clear.

Furthermore, imposing such a requirement would restrict freedom of speech and impose a "chilling effect" on the exercise of First Amendment rights. Few employers are brazen enough to proffer an intentional First Amendment violation as the reason for their adverse employment actions. Proof of a First Amendment violation is difficult at best, often depending upon circumstantial evidence, and the jury's evaluation of that evidence. Adding an intentional conduct element to the established First Amendment standard would further impair an aggrieved plaintiff's rights and "chill" his ability to speak freely concerning matters of public importance, such as the misspending of public funds. Imposing an intent requirement would sanction negligence-based explanations as an excuse for unconstitutional conduct. It would turn clear constitutional violations into unactionable decisions.

The lower court's incorrect decision of this issue also materially impacts the outcome of this case. By charging the jury that § 1983 requires proof of intent, the district court precluded the jury from lawfully evaluating petitioners' claim. Furthermore, by combining this § 1983 intent charge with the district court's refusal to give other requested charges -- on the defendants' burden to prove withdrawal from the conspiracy, the continuing nature of the conspiracy, and the conspiracy acting through an innocent intermediary -- that court all but directed a verdict for respondents.

For example, respondent Gardner, subsequently hired as the direct supervisor of petitioners, recklessly carried out

the execution order that retaliated against petitioners. Under an intentional conduct standard, the fact finder is precluded from determining whether he was liable to petitioners under § 1983 for recklessly and callously failing to investigate *why* his superiors wanted him to fire petitioners. Similarly, respondents Popovich (FAU's President), Nicewander (FAU's Vice-President of Administrative Affairs), and Michels (FAU's Provost) could have been held responsible under a lesser standard, because all three of these respondents recklessly conspired to terminate plaintiff. All three recklessly failed to supervise King, petitioners' supervisor before Gardner, regarding the false paper trail of "poor" performance. Likewise, President Popovich recklessly failed to supervise Gardner, who terminated petitioners. *Cf. City of Canton v. Harris*, 489 U.S. 378 (1989) (applying a callous indifference standard in a § 1983 supervisory case). Respondent Floyd, in interviewing Gardner, recklessly suggested that petitioners were personnel problems. Under the intentional conduct standard that the district court applied in this case, the jury was precluded from evaluating substantial reckless, callous, indifferent, or negligent conduct taken to the prejudice of petitioners' fundamental free speech rights. The jury's consideration of the case in light of the court's erroneous charge requires a new trial in this case. *See, e.g., Somer v. Johnson*, 704 F.2d 1473, 1477-78 (11th Cir. 1983).

This case presents an important question of federal civil rights law that materially impacts on fundamental First Amendment rights. The circuits are divided on the question and require the guidance of this Court. Petitioners submit that the Court should grant this petition to consider the question. Petitioners further suggest that the fundamental nature of the rights guaranteed by the First Amendment

mandates that the Court hold that plaintiffs bringing § 1983 First Amendment claims are not bound to prove that the defendant's adverse action was *intentionally* directed at violating their rights.

II. The Evidentiary Rulings Below Improperly Prohibit the Use of Expert Witnesses in Establishing Patterns and Practices of Retaliation in § 1983 Retaliatory Discharge Cases

Petitioners sought to introduce the testimony of Thomas Devine, a nationally prominent expert on whistleblowing and retaliation against whistleblowers, who had testified as such in previous cases. His testimony would have provided the jury with a description of the common methods used by employers to retaliate surreptitiously against whistleblowers. In prohibiting Mr. Devine from testifying, the district court stated:

> [W]hat is being proposed here is that the witness will present the plaintiffs' argument in an evidentiary posture. He is going to explore other cases, and how they are similar, and come up with a conclusion that this is a classic case of whistleblowing, and I don't think that is what is contemplated by Federal Rules of Evidence 701, 702, 703 and 704. . . .

Appendix, 22a. The district court further opined:

> *It doesn't seem to me that the subject matter is so scientific* as to require expert testimony, and I don't believe there is any difficulty in presenting this

> argument to the jury. . . . and I don't think that the requirements of Rule 702 are met.

Id. (emphasis added). Thus, the court ruled that the use of an expert to establish the common "modus operandi" of retaliation for the exercise of First Amendment free speech rights is outside the scope of the Federal Rules of Evidence, because such testimony is not sufficiently "scientific" to come within the scope of the rule. The Eleventh Circuit, apparently agreeing with the district court, affirmed the trial court's ruling without opinion.

Because such "pattern and practices" expert witnesses are crucial in establishing retaliation practices in a wide range of § 1983 cases, this Court, as supervisor of the federal courts and promulgator of the Federal Rules, should grant the petition to clarify the application of Fed.R.Evid. 702 and 704.

The Advisory Committee Notes to Rule 702 plainly state that the test is whether use of the expert will assist the trier of fact as a result:

> The rule is broadly phrased. *The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge.* Similarly, the expert is viewed, not in the narrow sense, but as a person qualified by "knowledge, skill, experience, training or education."

Fed.R.Evid 702 advisory committee's notes (emphasis added).

Furthermore, the advisory committee notes have recognized the need for experts in cases like this case: "An intelligent evaluation of the facts is often difficult or impossible without the application of some scientific, technical, or *other specialized* knowledge." *Id.* (emphasis supplied).

In advancing the broad scope intended for Rule 702, courts generally have allowed a broad array of experts to testify, particularly in the context of establishing a "pattern and practice" or the "modus operandi" of illegal conduct. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1502, 1505-06 (M.D. Fla. 1991) (authorizing experts to testify concerning sexual stereotyping and harassment); *see also United States v. Dunn*, 846 F.2d 761, 763 (D.C. Cir. 1988) ("Federal courts often permit experts to testify on narcotics operations because jurors are commonly unfamiliar with the methods by which drug dealers attempt to conceal their activities"); *United States v. Johnson*, 735 F.2d 1200, 1202 (9th Cir. 1984) (authorizing law enforcement officers to testify concerning the "techniques and methods" used by criminals as "[s]uch evidence helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior"); *Vucinich v. Paine, Webber, Jackson & Curtis*, 803 F.2d 454, 461 (9th Cir. 1986) (reversing the district court's refusal to allow an expert on the securities business to testify regarding trade standards); *Samples v. City of Atlanta*, 916 F.2d 1548, 1551 (11th Cir. 1990) (sustaining the testimony of a "use of force" expert in a civil rights action against police officers). Doubts regarding the admissibility of an expert's testimony should be resolved in

favor of allowing the expert to testify. 3 J. Weinstein & M. Berger, EVIDENCE ¶ 702[02], 702-30 (1982).

Also, Fed.R.Evid. 704 broadly defines the scope of an expert's testimony so as to include the ultimate issue to be decided by the trier of fact. Indeed, the Advisory Committee Notes to Rule 704 make clear that the rule specifically abolished the prior rule, which prohibited experts from testifying concerning the ultimate issue. Consistent with the Advisory Committee notes, this Court has recognized in *dicta* that "Rules 702-705 permit experts to testify in the form of an opinion, and without any exclusion of opinions on 'ultimate issues.'" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988). Addressing the admissibility of opinions or conclusions in official reports under Fed.R.Evid. 803(8)(C), this Court found that the thrust of the Federal Rules of Evidence was to relax "the traditional barriers to 'opinion' testimony." *Id.*; Cf. *Barefoot v. Estelle*, 463 U.S. 880, 898-99 (1983) (approving expert testimony regarding the ultimate issue of the "future dangerousness" of a criminal defendant).

The decisions below directly conflict with Rules 702 and 704. Rule 702 allows the testimony of "pattern and practice" experts, even though such testimony may not be "scientific." As authorized by the Advisory Committee Notes, plaintiffs' expert sought to discuss the commonly recognized characteristics of institutional reaction to whistleblowing and to apply them to the evidence in this case. Just as expert testimony was needed to establish the characteristics of illegal narcotics activity (*Dunn*, cited above), seemingly innocuous criminal activity (*U.S. v. Johnson*, cited above), illegal securities practices (*Vucinich*, cited above), or sexual harassment practices (*Robinson*,

cited above), such testimony is essential to establishing the common techniques used by employers to conceal their illegal motives in terminating whistleblowers. The characteristics of institutional reaction to whistleblowing are not intuitively obvious, so Devine's recognized expertise was crucial to assist the jury "to understand the evidence." Because the rulings below substantially and impermissibly narrowed the scope and extent of expert testimony allowed under the Federal Rules of Evidence, this Court should grant this petition.

Moreover, proper supervision of the federal courts and correct interpretation of the rules of evidence are not the sole concerns here. In this case, the district court's erroneous reading of the Federal Rules of Evidence undercut the First Amendment free speech guarantee. An interpretation of Fed.R.Evid. 702 and 704 that prohibits expert testimony on whistleblower retaliation practices, particularly when combined with an erroneous intentional conduct burden of proof, *see* Part I, above, effectively legalizes retaliatory employment actions against those exercising their free speech rights. In order to prevail in a § 1983 retaliatory discharge case, a plaintiff must prove that his discharge from employment resulted from the exercise of his constitutional rights. *See* Part I, above. Without an expert's testimony concerning the common characteristics of such conduct, this burden is almost impossible to meet in the face of a complex public employer conspiracy. The jury is left without guidance in evaluating whether the facts proven by plaintiff, some seemingly insignificant on their face, demonstrate a pattern or practice of retaliatory conduct. The result is that free speech is impaired -- to the public detriment -- because public employees with knowledge of wrongdoing, such as Taylor and Cotton, will

refuse to come forward to expose government corruption for fear of retaliation by their public employers.

Only rarely has this Court addressed the Federal Rules of Evidence. However, petitioners submit that the importance of the district court's erroneous evidentiary ruling, particularly considering its impact on fundamental First Amendment rights, merits granting the petition here.

CONCLUSION

For the foregoing reasons, petitioners Robert Taylor and Timothy Cotton submit that this Court should grant their petition to issue a writ of certiorari to the Eleventh Circuit.

Respectfully submitted,

JAMES K. GREEN
One Clearlake Centre
250 Australian Ave. S.
Suite 1300
W. Palm Beach, FL 33401
(407) 659-2009

M. DAVID GELFAND*
TERRY E. ALLBRITTON
KENNETH J. SERVAY
Appellate Advocacy Program
Tulane Law School
6801 Freret Street
New Orleans, LA 70118
(504) 865-5732, 865-5965

Counsel for Petitioners

**Counsel of Record*

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5668

[Stamped: Filed SEP 29 1992]

D. C. Docket No. 89-8046-CIV-JCP

ROBERT TAYLOR and TIMOTHY COTTON,
Plaintiffs-Appellants,
Cross-Appellees,

versus

HELEN POPOVICH, KENNETH MICHELS, DENNIS NICEWANDER, DON GARDNER, MARILYN FLOYD, LEONARD BERRY,
Defendants-Appellees,
Cross-Appellants,

FLORIDA ATLANTIC UNIVERSITY, ANTHONY CATANESE,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(September 29, 1992)

Before DUBINA and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

Costs are taxed against plaintiffs-appellants, cross-appellees.

Entered: September 29, 1992
For the Court: Miguel J. Cortez, Clerk

By: Karleen McNabb [signature]
Deputy Clerk

ISSUED AS MANDATE: NOV 4 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-8046-CIV-PAINE

ROBERT TAYLOR and
TIMOTHY COTTON
Plaintiffs,

vs. [Stamped: Filed May 17, 1991]

FLORIDA ATLANTIC UNIVERSITY,
HELEN POPOVICH, KENNETH MICHELS,
DENNIS NICEWANDER, DON GARDNER,
MARILYN FLOYD, LEONARD BERRY,
and ANTHONY CATANESE,
Defendants.

_____/

FINAL JUDGMENT

This action came on for trial before the court and a jury, Honorable James C. Paine, District Judge, presiding, and the issues having been duly tried, the jury having rendered its verdict, and the Court having entered its Final Order.

It is Ordered and Adjudged that the Plaintiffs, ROBERT TAYLOR and TIMOTHY COTTON, take nothing from this action and the Defendants, FLORIDA ATLANTIC UNIVERSITY, HELEN POPOVICH,

KENNETH MICHELS, DENNIS NICEWANDER, DON GARDNER, MARILYN FLOYD, LEONARD BERRY, and ANTHONY CATANESE, go hence without day.

Dated at West Palm Beach, Florida, this 17th day of May, 1991.

T.G. CHELEOTIS, CLERK OF COURT
By: Svava Ringheim (signature)

[Stamped
Certified to be a true
and correct copy of the original.
T.G. Cheleotis, Clerk
U.S. District Court
Southern District of Florida
By Svava Ringheim (signature)
Deputy Clerk
Date May 17 1991]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-8046-CIV-PAINE

ROBERT TAYLOR and
TIMOTHY COTTON
Plaintiffs,
vs. [Stamped: May 17 1991]

FLORIDA ATLANTIC UNIVERSITY,
HELEN POPOVICH, KENNETH MICHELS,
DENNIS NICEWANDER, DON GARDNER,
MARILYN FLOYD, LEONARD BERRY,
and ANTHONY CATANESE,
Defendants.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings

The jury has determined that the exercise of constitutional rights to free speech was not a substantial or motivating factor in the decisions to issue nonrenewal contracts to Plaintiffs ROBERT TAYLOR and TIMOTHY COTTON. No award of compensatory damages for mental and emotional distress or lost past or future earnings, or punitive damages, was made. Consistent with the jury's verdict, the Court finds no basis for reinstatement of either Plaintiff to his former position at FLORIDA ATLANTIC UNIVERSITY ("FAU"), or, alternatively, payment for lost future earning capacity. Reinstatement would be

unreasonably harmful and prejudicial to the relationship of the FAU administration to its employees. Further, the Court finds no need for an injunction prohibiting future retaliatory conduct.

Conclusions

1. The Plaintiffs shall take nothing by this action.

2. The Court shall reserve jurisdiction as to the issues of taxable costs and attorneys' fees.

3. The Clerk of Court shall enter Final Judgment in accordance with this Order.

DONE and ORDERED in West Palm Beach, Florida, this 17th day of May, 1991.

James C. Paine (signature)
UNITED STATES DISTRICT JUDGE

Copies furnished:
James Green, Esq.
Richard Lubin, Esq.
Trent Steele, Esq.
James Williams, Esq.
Michael Petrucelli, Esq.
Steven Stinson, Esq.
Stephen Radford, Esq.
Gary Isaacs, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-8046-CIV-PAINE

ROBERT TAYLOR and
TIMOTHY COTTON
Plaintiffs,

vs.

FLORIDA ATLANTIC UNIVERSITY,

HELEN POPOVICH, KENNETH MICHELS, DENNIS NICEWANDER, DON GARDNER, MARILYN FLOYD, and LEONARD BERRY,
Defendants.
_____/

OMNIBUS ORDER ON MOTIONS FOR DIRECTED VERDICT

This matter came to be heard on the parties' Motions for Directed Verdict at the close of trial.

PETITION

Plaintiff COTTON has termed his nomination of Plaintiff TAYLOR for a Distinguished Service Award a "petition to a government official," protected by the Constitution. The First Amendment grants a right to "petition the Government for a redress of grievances." U.S. Const. amend. I (emphasis added). It is unclear what

grievance COTTON sought to redress through his nomination. The lone case cited by the Plaintiffs, Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983), concerned a lawsuit filed against the State of Florida and a State official, and sheds no light upon the instant case.

Moreover, this theory was not raised in the Second Amended Complaint, but was first mentioned in the Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment. An opposition memorandum is not the appropriate vehicle through which to raise new theories of action.

In sum, COTTON's nomination does not fall within the petition clause, both rather is best viewed as speech.

ASSOCIATION

Similarly, the evidence does not indicate that Plaintiff COTTON was engaged in any conduct that could invoke the right of association. Courts refer to a constitutionally protected "freedom of association" in two distinct senses. The first is "intimate association," protecting "choices to enter into and maintain certain intimate human relationships." The second is "expressive association," whereby individuals band together to express views protected by the First Amendment - such as speech and freedom or religion. City of Dallas v. Stanglin, --- U.S. ---, 109 S.Ct. 1591, 1594-95 (1989); Roberts v. United States Jaycees, 468 U.S. 609, 618-22 (1984). Contrary to COTTON's argument, the Supreme Court has expressly held that the Constitution does not recognize a generalized right of "social association." Stanglin, 109 S.Ct. at 1595.

While this Court has previously noted that terminations based upon an employee's association with another may be actionable, no facts adduced at trial suggest that the relationship between COTTON and TAYLOR falls within either constitutionally recognized form of association. In Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984), a police officer's termination was improperly motivated by his dating the daughter of a convicted felon. COTTON, however, was not engaged in such an intimate relationship with TAYLOR. Moreover, the evidence that COTTON spoke out in support of TAYLOR does not constitute the type of group action that underlies the right of expressive association. There is no evidence that these Plaintiffs formally banded together, agreed to a common goal or agenda, or coordinated their speech toward some end. Compare Hinkle v. Christensen, 733 F.2d 74 (8th Cir. 1984) (union activities).

To the extent that the issuance of a nonrenewal contract to COTTON was based upon his public support of TAYLOR, COTTON has rights grounded in the First Amendment. But the correlative right of association is not implicated, and a verdict is directed in the Defendants' favor on this issue.

PROTECTED SPEECH

The Court agrees that it must make an initial ruling, pursuant to Connick v. Myers and its progeny, as to which, if any, categories of speech are protected by the First Amendment. The Court must first determine whether the speech may be "fairly characterized as constituting speech on a matter of public concern." Connick, 461 U.S. 138, 146. If the speech is purely private, then no protection attaches

If the speech concerns public matters, the Court must then apply the Pickering balancing test, weighing the employee's First Amendment interests against "the interest of the state, of an employer, in promoting the efficiency of the public services it performs through its employees." Under both prongs of this analysis, "the context circumstances of the employee's speech must be considered." Bryson v. City of Waycross, 888 F. 2d 1562, 1565 (11th Cir. 1989).

The Plaintiffs have designated ten separate categories of speech, which this Court will analyze individually:

1,3,4. TAYLOR'S comments to newspapers, the State Attorney's Office, and Mr. Sweeney. Speech that "seek[s] to bring to light actual or potential wrongdoing or breach of [the] public trust" touches upon matters of public concern. Connick v. Myers, 461 U.S. 138, 148 (1983). TAYLOR's speech concerning procurement fraud at FAU clearly meets this definition. Because a public employer has no legitimate interest in retaliating against whistleblowers, this speech passes the Pickering balancing test as well. See, e.g., Porter v. Califano, 592 F.2d 770, 773-74 (5th Cir. 1979) (disruption caused by the whistleblowing does not authorize termination).

2. COTTON's comments to newspapers. COTTON was quoted in several newspaper articles criticizing the FAU administration's lack of interest in the Broward Tower facility. Because this speech relates to the wisdom or efficiency of FAU's operations, it may be fairly characterized a speech on a matter of public concern; the fact that the newspaper printed his statements is evidence of their public nature. Applying the balancing test, the Court notes that no evidence was introduced to prove that

COTTON's comments to newspapers hindered his own performance, that of his coworkers, or his inter-office working relationships. Moreover, a college atmosphere is one that should be unusually tolerant of any expression, including criticism of the administration. See Trotman v. Bd. of Trustees of Lincoln Univ., 635 F.2d 216, 230 (3d Cir. 1980). For these reasons, the Court holds that this category of speech is protected.

5,6. COTTON's nomination and public support of TAYLOR. The Court has previously explained that nominating TAYLOR for a Distinguished Service Award was speech, not a petition to the government. Defendants have argued that, because the nomination was communicated within the university, the speech is wholly private. But freedom of speech is not lost by the employee who chooses to communicate public views through private channels. Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979). Under the Connick analysis, open support of a known whistleblower touches upon a matter of public concern. And, just as a public employer has no legitimate interest in terminating a whistleblower, neither can he terminate those who have publicly supported the whistleblower. COTTON's speech in this regard is protected.

7,8,9. Subsequent communications regarding perceived retaliation. After the whistleblowing but before the issuance of nonrenewal contracts, TAYLOR and COTTON engaged in oral and written communications wherein they expressed a concern that TAYLOR was being retaliated against. The Plaintiffs seek to characterize these statements of concern as protected speech activity. This argument is flawed in three key respects. First, statements

of concern over personal job security are private in nature. See Connick, 461 U.S. at 147-49. Second, these statements occurred long after the alleged conspiracy to fire TAYLOR and COTTON was formed in 1986; stated differently, there exists no causal connection between the Plaintiffs' Second Amended Complaint does not predicate liability under Section 1983 upon the subsequent communications. While certain actions in 1986 might be evidence of a pre-existing scheme to retaliate. Third, the Plaintiffs' Second Amended Complaint does not predicate liability under Section 1983 upon the subsequent communications. While certain actions in 1986 might be evidence of a pre-existing scheme to retaliate against TAYLOR and COTTON, these communications do not constitute independently protected speech.

10. The "Twenty Questions" Memo. Although they have now apparently conceded the point, the Plaintiffs initially argued that a memorandum from COTTON to Defendant GARDNER, which COTTON himself acknowledged was ill-advised, is speech protected by the First Amendment. Under this argument, had GARDNER issued a renewal contract based solely upon the content of the Twenty Questions Memo, COTTON would have a cause of action under Section 1983. The Court strongly disagrees. Not only is the subject matter of the Twenty Questions Memo wholly private, but it cannot pass the Pickering balancing test. The memorandum is "rude and insulting" in tone, and would clearly affect GARDNER's "need to maintain loyalty, discipline and good working relationships among those he supervises." Dartland v. Metro. Dade County, 5 F.L.W. Fed. D147 (S.D. Fla. March 29, 1991). Finally, the Twenty Questions Memo was not raised in the Second Amended Complaint.

GARDNER

Defendant GARDNER claims entitlement to a directed verdict because he testified that he was not improperly motivated in recommending that TAYLOR and COTTON be terminated. The Court has previously determined that circumstantial evidence adduced during the Plaintiffs' case-in-chief created a jury question as to his motivations. His testimony, which may be rejected as not credible, does not change this analysis.

DEPRIVATION VS. CONSPIRACY

The alleged act by which each Plaintiff was deprived of his constitutional rights was the issuance of nonrenewal contracts. The evidence indicates that the nonrenewal contracts were recommended by Defendant GARDNER, approved by Defendant POPOVICH, and signed by George Perkins. Thus, the only name Defendants who could fairly be said to have participated, either directly or indirectly, in the issuance of nonrenewal contracts are GARDNER and POPOVICH. The Court hereby directs a verdict in favor of MICHELS, NICEWANDER, FEDERICO, and BERRY on the issue of actual deprivation.

These Defendants remain, of course, potentially liable for conspiracy to deprive constitutional rights. Conspiracy is, in fact, "the legal mechanism through which to impose liability on each and all the defendants without regard to the person doing the particular act." Jones v. Bales, 58 F.R.D. 453, 458 (N.D.Ga. 1982), aff'd, 480 F.2d 805 (5th Cir. 1973) (per curiam).

As the MICHELS' claim that he was not a state actor, the Court responds that he was still employed at FAU during the cabinet meetings wherein retaliation was allegedly discussed. Furthermore, a private party engaging in joint action with state officials acts with color of state law. Dennis v. Sparks, 449 U.S. 24, 28 (1980).

RECOMMENDATION

Defendant GARDNER has cited Hughes v. Halifax, 855 F.2d 183, 186 n.4 (4th Cir. 1988) for the proposition that, by merely recommending that TAYLOR and COTTON be terminated, he did not participate in a deprivation of rights. The act of recommendation may, however, set in motion a series of reactions that the actor knows will ultimately inflict constitutional injuries on third parties. Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Thus, a party who recommends termination may be liable under Section 1983. Darnell v. Ford, 903 F.2d 556, 562 (8th Cir. 1990); Wulf v. City of Wichita, 883 F.2d 842, 862-63 (10th Cir. 1989).

QUALIFIED IMMUNITY

As the Court has previously held, the law is clearly established that a public employer cannot retaliate against his employee's exercise of First Amendment rights. Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1505 (11th Cir. 1990). The applicability of a qualified immunity defense, therefore, depends upon resolution of a factual question: were the Defendants' actions improperly motivated? Ansley v. Heinrich, 925 F.2d 1339, 1346-48 (11th Cir. 1991). In this regard, the defense rises or falls with the liability issues. Directed verdict is inappropriate.

While the jury must decide the liability issues, they should not be instructed on the qualified immunity defense, which is, ultimately, a question of law for the Court. Ansley, 925 F.2d at 1348.

FUTURE DAMAGES

The Defendants contend that the Plaintiffs' own expert acknowledged that TAYLOR and COTTON have suffered no loss of future earning capacity. To the contrary, the expert did assign a monetary value to the Plaintiffs' future damages. It is for the jury to decide whether this value is reasonable.

PUNITIVE DAMAGES

The Court has held that there is sufficient evidence to create a jury question as to each Defendant whether he or she participated in a scheme to deprive the Plaintiffs' constitutional rights. While a finding of liability does not mandate a punitive damage award, intentional deprivation and/or a conspiracy to deprive rights is an adequate predicate for punitive damages. This issue must go to the jury.

DONE and ORDERED in West Palm Beach, Florida, this 10th day of May, 1991.

James C. Paine (signature)
UNITED STATES DISTRICT JUDGE

Copies furnished:
counsel of record

Excerpt from District Court's Jury Charge

[BY THE COURT:]

Please note that, although Florida Atlantic University and its current president, Anthony Cantonese, have been named defendants, any claims relating to these defendants will be decided solely by the Court. Your assistance will not be required.

In this case plaintiffs Taylor and Cotton each claim that defendants Gardner and Popovich, while acting under color of state law, intentionally deprived him of his constitutional rights under the Constitution of the United States. Specifically, each plaintiff claims that while defendants Gardner and Popovich were acting under color of authority of Florida Atlantic University they intentionally violated that plaintiffs' constitutional rights; namely, that they were deprived of their rights under the First and Fourteenth Amendments of the Constitution when Gardner recommended and Popovich approved that Cotton and Taylor be issued nonrenewal or terminal contracts because of these plaintiffs' exercise of their rights of free speech.

Under the First and Fourteenth Amendments of the Constitution of the United States, every citizen has the right to freedom of speech, which includes the right to speak about matters of public concern. No public employer may terminate an employee for exercising that right.

For purposes of this case, you are instructed that the following acts of speech, and no others, are constitutionally protected. First, plaintiff Taylor's comments to newspapers, the State Attorney's Office and Mr. Sweeney; second,

plaintiff Cotton's comments to newspapers; and third, Cotton's nomination and public support of Taylor.

The law provides that a person may sue in this Court for an award of money damages against anyone who, under color of any state law or custom, intentionally violates the plaintiff's rights under the Constitution of the United States.

In order to provide their claims against an individual defendant, therefore, each plaintiff must prove by a preponderance of the evidence each of the following facts: First, that the acts of the defendant were under color or authority of the State of Florida; second, that the plaintiff's exercise of his protected First Amendment rights was a substantial or motivating factor in the defendant's participation in a decision to issue nonrenewal contracts to the plaintiff; and third, that the defendant's acts were the proximate or legal cause or damages sustained by the plaintiffs.

In this case the parties have stipulated or agreed that the defendants Gardner and Popovich acted under color of state law and you should, therefore, accept that fact as proven.

In order to prove that his speech activities were a substantial or motivating factor in defendant Gardner's decision to recommend or defendant Popovich's decision to approve that a nonrenewal contract be issued, a plaintiff does not have to prove that the protected speech activities were the only reason the defendants acted against him. It is sufficient if the plaintiff proves that his protected speech activities were a substantial consideration that made a difference in the defendant's decision.

Finally, for a defendant's acts to be the proximate or legal cause of damages it must be shown that, except for such conduct, the damages would not have occurred. Causation can be established by direct personal participation or by participation in setting in motion a series of acts by others which the actor knew or reasonably should have known would cause others to inflict constitutional injuries to third parties.

If you find in each plaintiff's favor with respect to each of the things he must prove you must then decide whether the defendants have shown by a preponderance of the evidence that the plaintiff would have been issued a nonrenewal contract for other reasons, even in the absence of the protected speech activity. If you find that the plaintiff would have been issued a nonrenewal contract for reasons apart from the speech activity then your verdict should be for the defendants.

If you find in either plaintiff's favor with respect to each of the things he must prove as to either defendant and further find that a defendant has not proven that the plaintiff would have issued a nonrenewal contract for other reasons then the defendant has deprived the plaintiff of his constitutional rights and you must next consider the claim of conspiracy. Otherwise, the plaintiff has not deprived, has not been deprived of his constitutional rights, and you need not consider the claim of conspiracy, because where there has been no deprivation of constitutional rights, there can be no liability for conspiracy.

Each plaintiff has claimed that defendants Gardner, Popovich, Michels, Nicewander, Federico and Berry

participated in a conspiracy to deprive his right to free speech. In order to prove this claim, each plaintiff must prove by preponderance of the evidence each of the following facts: First, that there existed a conspiracy; second, that the purpose of the conspiracy was to deprive the plaintiff of his constitutional right to free speech by issuing him a nonrenewal contract.

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. So a conspiracy is a kind of partnership in which each member becomes the agent of every other member. The essence of a conspiracy is a combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and may have discussed some common aims and interests is not necessarily proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement of that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be or the details thereof or the means by which the object or purposes were to be accomplished. In order to establish that a conspiracy existed, the plaintiff must show that members of the conspiracy in some way or manner or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not show that all the means or methods employed to carry out the alleged conspiracy were agreed upon, nor that all means or methods which were agreed upon were actually used or put into operation, nor that all persons alleged to have been members of the claimed conspiracy were members of such conspiracy.

In this suit each plaintiff alleges that the defendants Gardner, Popovich, Michels, Nicewander, Federico and Berry are co-conspirators. There can be no conspiracy unless one, unless more than one person is involved but it may be that not all the persons charged with being conspirators are, in fact, conspirators. In order to succeed a plaintiff does not have to show you that every one of the named defendants joined in the conspiracy, but he does have to show that at least one of those named defendants conspired with at least on other named defendant.

One may become a member of a conspiracy without full knowledge of all of the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.

* * *

District Court's Ruling on Plaintiffs' Objection to Intentional Conduct § 1983 Charge

[BY THE COURT:]

Now, the use of the word "intentionally' at page 10 of the proposed instructions is taken from the Eleventh Circuit pattern. It's my view that this word properly describes an element of the cause of action which must be proved, so I intend to leave that word in there.

District Court's Ruling on Proffered Testimony of Expert Devine

[BY THE COURT:]

Well, it looks to me from the proffer like what is being proposed here is that this witness will present the plaintiffs' argument in an evidentiary posture. He is going to explore other cases, and how they are similar, and come up with a conclusion that this is a classic case of whistleblowing, and I don't think that is what is contemplated by Federal Rules of Evidence 701, 702, 703 and 704, which treat the matter of presentation of expert testimony, and on the basis of what is said in those rules, and also the authorities which have been furnished to me by you gentlemen, including the Cross case, which is in slip opinion now, and Pat just handed it to me here, that case doesn't throw a whole lot of light on what we can do. It does simply say in the appropriate head note, we have wide descretion [sic] in determining whether we should exclude such testimony, and the action will sustain unless it is manifestly erroneous.

I will exercise that descretion [sic], and grant the motion in limine as to the testimony of this witness. It doesn't seem to me that the subject matter is so scientific as to require expert testimony, and I don't believe there is any difficulty in presenting this argument to the jury which is what this witness will do according to the way his testimony has been proffered, and I don't think that the requirements particularly of Rule 702 are met.

So the motion in limine is granted.

U.S. CONSTITUTION, AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION, AMEND. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

Federal Rule of Evidence 701:
Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Federal Rule of Evidence 702:
Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Evidence 703:
Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon

the subject, the facts or data need not be admissible in evidence.

Federal Rule of Evidence 704:
Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Federal Rule of Evidence 705:
Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Supreme Court, U.S.
FILED
MAR 31 1993
OFFICE OF THE CLERK

No. 92-1287

In The

Supreme Court of the United States

October Term, 1992

ROBERT TAYLOR and TIMOTHY COTTON,

Petitioners,

v.

FLORIDA ATLANTIC UNIVERSITY; HELEN POPOVICH; KENNETH MICHELS; DENNIS NICEWANDER; DON GARDNER; MARILYN FLOYD; LEONARD BERRY; and ANTHONY CATANESE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE IN OPPOSITION OF FLORIDA ATLANTIC UNIVERSITY, HELEN POPOVICH, DON GARDNER AND ANTHONY CATANESE

Betsy E. Gallagher*
Gail Leverett
Kubicki, Draper,
Gallagher & McGrane, P.A.
25 West Flagler Street
Penthouse Suite
Miami, FL 33130
Telephone: (305) 374-1212

Counsel for Respondents Florida Atlantic University, Helen Popovich, Don Gardner and Anthony Catanese

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the jury instructions properly stated the requirements of liability under 42 U.S.C. § 1983 in a case involving allegations of unconstitutionally inflicted punishment for speaking?

2. Whether the District Court's evidentiary ruling excluding expert testimony on the grounds that it would not be of assistance to the jury constituted a proper application of Fed. R. Evid. 702?

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No. 92-1287

In The

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October Term, 1992

ROBERT TAYLOR and TIMOTHY COTTON,

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FLORIDA ATLANTIC UNIVERSITY; HELEN POPOVICH; KENNETH MICHELS; DENNIS NICEWANDER; DON GARDNER; MARILYN FLOYD; LEONARD BERRY; and ANTHONY CATANESE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE IN OPPOSITION OF FLORIDA ATLANTIC UNIVERSITY, HELEN POPOVICH, DON GARDNER AND ANTHONY CATANESE

Respondents Florida Atlantic University, Helen Popovich, Don Gardner and Anthony Catanese respectfully ask this Court to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case.

STATEMENT OF THE CASE

A. Introduction

This petition invoives a single ruling by the trial court on jury instructions, and an evidentiary ruling excluding the testimony of petitioners' proposed expert witness on "whistleblowing." When viewed in the appropriate factual context, it is clear that the questions isolated for review do not present appropriate grounds for invoking this Court's discretionary jurisdiction.

B. The Course of Proceedings

Petitioner Robert Taylor commenced this action in January of 1989 by filing a complaint seeking declaratory and injunctive relief and damages against respondents Helen Popovich, Don Gardner, Leonard Berry, Marilyn Floyd, Kenneth Michels and Dennis Nicewander. R1-1. The complaint alleged that the defendants had conspired to retaliate against Taylor for the exercise of his First and Fourteenth Amendment rights, and further sought relief pursuant to Florida's "Whistleblower's Act." Fla. Stat. § 112.3187 (1986). R1-1. Shortly thereafter, an Amended Complaint was filed which added Timothy Cotton as a plaintiff, and which sought the same relief on essentially identical allegations. R1-15.

Petitioners filed a Second Amended Complaint which named Florida Atlantic University ["FAU"] as a defendant. R1-32. The Second Amended Complaint, upon which petitioners proceeded to trial, alleged that Taylor was punished because he participated in investigations by the State Attorney's Office and the Board of Regents

into purchasing improprieties at FAU which Taylor had discovered. R1-32-4. Petitioners alleged that Cotton was punished because he sent a memorandum nominating Taylor to receive an award for his role in exposing corruption, and because he openly criticized the administration about problems associated with the Broward Tower facility. R1-32-6.

After Anthony Catanese replaced Popovich as president of FAU, the trial court entered an order substituting Catanese as defendant in his official capacity only for Popovich in her official capacity. R9-297.

The trial court entered summary judgment in favor of respondents on the state "Whistleblower's Act" count. R9-300. After a three week trial, the jury returned a verdict in favor of all respondents. R10-345. Consistent with the jury's verdict, the district court denied the declaratory and injunctive claims against FAU and Catanese. R10-347. Final judgment was entered in favor of respondents, and petitioners' post-trial motions were denied.

On September 29, 1992, the Eleventh Circuit Court of Appeals affirmed the final judgments without a written opinion.

C. Statement of Facts

Petitioners' statement of facts is replete with inaccuracies, misstatements, and broad conclusions not supported by the evidence. The statement also omits pertinent evidence relating to the issues raised in the petition.

1. FAU's Organization

Respondent Popovich was the President of FAU until 1988. In 1986, Michels was Provost and Vice-President for Academic Affairs, and Nicewander was the Vice-President for Administrative Affairs. Floyd was Assistant Vice-President for Academic Affairs, and reported to Michels. Berry replaced Michels in 1987.

FAU's computing functions were originally divided into two separate departments: academic computing, which was responsible for providing services to the faculty, and administrative computing, which was responsible for servicing the registrar and the administrative needs of the University. R15-123. Those in academic computing, including Taylor and Cotton, ultimately reported to Michels, and later to Berry. Those in administrative computing reported to Nicewander, and later to Perkins, who is not a party to this action.

Respondent Gardner was hired in 1988 as Associate Vice-President for Information Resource Management, and was in charge of reorganizing and consolidating the University's computing departments. R22-1491-93; R27-2516. Gardner was *not* hired to "replace" William King, who was the Director of Academic Computing, and Taylor's direct superior.

2. Taylor's Allegations of Improprieties in 1986, Media Attention, and FAU's Response

In 1985, Taylor began questioning procurement practices at FAU when Lillian Gerweck, a purchasing agent, went to Taylor with questions regarding a requisition she

had received for a personal computer – an IBM clone. R20-992, 996-997, 999. There was no apparent reason for the requisition to have been made as a "sole source" purchase because a similar computer could have been purchased for less money through a pre-bid state contract. R20-999. Having gotten no answers from the supplier, Gulfstream Microsystems ["GMS"], Gerweck approached Taylor. R20-999, 1000.

The petition inaccurately states the nature of Taylor's duties in the area of "approval" of computer purchases. Taylor's *only* approval function was to review requisitions for computer purchases by any academic department to ensure that the equipment or software was compatible with the equipment already in place. R19-647, 653-654, 657. When he was presented with the "sole source" requisition for the GMS computer, Taylor approved it for compatibility. R19-664. While he had a concern that the computer should not have been requisitioned as a "sole source" item, he did not "disapprove" the purchase. R19-660. When Gerweck later brought another requisition for eight GMS computers to Taylor, he approved that purchase for compatibility as well. R19-678. Taylor took his concerns about the GMS computer purchases to King, and together they brought the matter up before the computer advisory committee, whose function it was to give faculty input to the administration regarding the needs of the faculty, and to give general guidance on policy issues. R19-660, 674; R23-1741, 1742. The committee's response was that the matter was an administrative concern which should be dealt with through administrative channels, and not a

matter for committee consideration or action. R19-674; R23-1742.

Taylor discussed his concerns about the computer purchase with John Morack (who reported to Nicewander), and told him that he should not approve the purchase. R19-666-68. Morack agreed that he would not sign the form, and the requisition form was ultimately signed by Nicewander when Morack was on vacation. R19-671; R20-908. Nicewander was unaware that anyone had raised questions regarding the propriety of the sole source requisition for the GMS computer before he signed the form approving the purchase. R28-2663, 2726.

Taylor enlisted the assistance of his friend, John Munson, a tenured professor. R15-118, 127. During the spring and summer of 1986, Munson and Taylor continued looking into purchasing practices by FAU, utilizing Taylor's access to information flowing through the computer center. R15-136: R17-223; R19-680. Dissatisfied with the results of Munson's attempts to speak to Dean Luing (who had initially requisitioned the GMS computer) and Jeff Tennant, an assistant vice-president, Munson and Taylor decided that the best course of action was to take their concerns to the Palm Beach County State Attorney's office, and Munson did so in September of 1986. R15-138, 140, 144-145, 151; R19-678, 683.

The State Attorney's office launched an investigation into FAU's purchasing procedures in which Taylor participated by providing information. R19-683, 685-686. Cotton admittedly had nothing to do with the State Attorney's investigation, other to than suggest it as a

possibility. R21-1202. After approximately two months, finding nothing in the nature of criminal conduct, the State Attorney's office determined that the problems at FAU were internal and should be handled by another agency. R17-341. Ultimately, Harvey Sweeney, Chief Internal Auditing Officer for the Board of Regents, conducted an audit which culminated in issuance of a report critical of the leadership provided by upper management. R17-253, 259.

President Popovich learned of the State Attorney's investigation from Chancellor Reed in early October. R22-1432. Before that time, she had been unaware of Munson's and Taylor's allegations of improprieties. R22-1432, 1433. In the following days, Popovich investigated the computer purchases, which she thought presented the most serious problem. R22-1438, 1439. On October 13, 1986, Popovich met with Chancellor Reed who suggested that Harvey Sweeney conduct an audit, which Popovich agreed would be a good idea. R22-1440.

On October 30, 1986, after Sweeney's audit was completed, Popovich held a meeting with those involved with the allegations, including Gerweck, Taylor, and Munson. R22-1441-42. The purpose of the meeting was to find out what had happened in order to take whatever corrective action was needed. R15-161; R22-1442-43. The meeting was not successful because, Popovich later learned, lower level employees said they did not feel free to talk in front of their superiors. R22-1444. The meeting confirmed to Popovich that there were significant problems with sole source purchases, and she undertook corrective measures. R22-1444-45.

After the meeting Taylor spoke to the press about his allegations and his frustrations with the administration's response. R19-696, 703-704. During the fall of 1986, the appearance of newspaper articles quoting Munson and Taylor escalated in frequency, and the articles were increasingly critical of the administration. R27-2419; R28-2703; R19-703-5.

As a result of complaints from employees in the purchasing department that media requests for information were interfering with their ability to get work done, Nicewander issued a memorandum to the administrative directors who reported to him regarding responses to media representatives. R15-169; R28-2687-89. When Popovich learned of the memorandum, she asked Nicewander to rescind it immediately, fearing that it would be perceived as "stonewalling." R22-1453-54. Nicewander promptly did so, and issued a memorandum the next day which stated that the earlier memorandum was not intended to convey the message that employees were not to respond to media inquiries. R17-173; R28-2690.

During November of 1986, the allegations of improprieties continued. R22-1454. Popovich admitted that there were deficiencies in management and, eager to get those problems resolved, worked with Chancellor Reed and a Board of Regents task force, headed by Roberta Maddox, to prepare and implement a plan to improve management practices at FAU. R22-1455-58, 1462-64; R23-1550. The intense media coverage resulted in an erosion of public confidence in the ability of Nicewander

and Michels to continue in their positions as vice-presidents, and Popovich asked for their resignations on December 5, 1986. R22-1460; R23-1548.

In 1987 the cabinet set about the business of working through the task force reports, and getting the University's business affairs in order. R22-1480. Munson left in FAU in 1988, and he testified that by that time, all of the events of 1986 had blown over. R15-174; R17-184.

3. Cotton's Statements to the Press

In early 1987, when FAU's Tower facility opened in Broward County, Cotton spoke to the media about problems associated with the facility, and openly criticized the administration. R22-1481; R20-1061-63, 1068. Cotton again spoke to reporters in December of 1987, calling the Tower a "glittering glass goolog." R21-1092-95. There was no evidence that Cotton spoke to the media regarding the purchasing improprieties which were at issue in 1986.

4. King's 1987 Reorganization of Academic Computing, the Aftermath, and the Attempted Transfer of Taylor

The petitioners' statement of facts represents a serious distortion of the evidence related to the events following the publicity of 1986, and the reorganization of FAU's computing departments.

William King was an employee of Southeast Regional Data Center ["SERDAC"], which contracted with FAU to manage the academic computing center. R24-1917, 1920. Taylor was associate director of academic computing, and

his primary function was to serve as a communications conduit to King. R24-1927.

Due to the expansion of staff and an increase in the use of computers, King decided to reorganize academic computing in early 1987. R24-1952-55. Because the job had gotten too unwieldy for only one associate director, the reorganization created two new assistant director positions which reported to King, one of which went to Cotton. R24-1952-53. With responsibility for reporting spread out, King believed there would be more effective communication. R24-1954.

During 1987 Taylor and King exchanged memoranda, electronic mail messages and "personal counseling notes" – none of which went into Taylor's personnel file – regarding various performance issues. R24-1956-57, 1961-79, 1981, 1985-1994.[1] King felt that Taylor had a "blue collar" mentality, and that he was not a self-starter. R19-719; R24-1964. In a written response to one of King's personal counseling notes in October of 1987, Taylor acknowledged performance problems and said that he was "feeling the depression from the fallout of the Michels, Nicewander debacle," despite the fact that nothing had transpired in the intervening year which would keep him involved in the issue. R20-803; R24-1978-79.

Between October of 1987 and February of 1988, Taylor's performance did not improve. R24-1999. Prompted by a loud and disruptive argument in the hallway between Taylor and his girlfriend, King sent Taylor a

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[1] These memoranda were kept by King in his personal file regarding Taylor. R24-1958.

performance counseling note, which did go to his personnel file, addressing some of the concerns which had been discussed in the preceding months, including Taylor's failure to remain technically current. R20-807-9; R24-1999-2006. Taylor's written response directly challenged the need to remain technically current, saying that was not in his job description. R20-813; R24-2009.

On February 18, 1988, King sent Taylor a memorandum temporarily reassigning him to the Broward County campus to fill in for an employee, Margie Bullock, who was going on maternity leave. R24-2007. King's decision was based on two considerations: continuity of supervision at the Broward facility, and splitting up Taylor and his girlfriend. R24-2007. Taylor was furious, and alleged the transfer was in retaliation for his whistleblowing activity in 1986. R19-727. He took his grievance to King's superiors; first to Floyd, then to Berry, and finally to president Popovich. R19-727-31. Cotton involved himself in the transfer issue, and sent several memoranda and electronic mail messages to King in an effort to keep Taylor from having to go to Broward County. R21-1104, 1148-53; R26-2033, 2042.

Ultimately, it was determined that Taylor would not be reassigned, and the position was filled by someone outside the department, Fritz Postelwaite. R26-2044. The announcement of Postelwaite's assignment generated a flurry of angry electronic mail messages between Cotton and King. R26-2045-49, 2068-76. After the announcement, Taylor sent an electronic mail message to the entire academic computing staff which stated that he felt the attempted transfer had been in retaliation for his whistleblowing activities. R26-2055-56.

In response to the turmoil created over the attempted transfer, Berry called a meeting of the academic computing staff on March 25, 1988. R29-2866-72. At the meeting, Taylor called King a "coward" and a "bully." R20-861. In front of the entire staff, Cotton read the contents of a memorandum to King wherein he called the administration "Bozos;" suggested poor judgment on the part of King and his superiors regarding the transfer issue and the assignment of Postelwaite; and questioned King's authority to assign staff. R21-1177-85.[2]

5. FAU's Consolidation of Computing Departments and Gardner's Hiring

As a result of problems in administrative computing, and an explosion of use needs, Popovich was dissatisfied with the configuration of the FAU's computing departments, and again asked for the assistance of Roberta Maddox in making recommendations in that area. R22-1491-92. The decision was made to reorganize the departments in order to bring academic computing and administrative computing under one person who could make more efficient use of personnel. R22-1493. A search committee was appointed, and Gardner was eventually hired for the newly-created position of Associate Vice-President for Information Resource Management. R22-1491-94.

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[2] It was after this meeting that Berry told Sycamore that he wanted to "get rid of all three of them." R18-595, 600. Sycamore did not testify, as represented by petitioners, that Berry told him that Cotton and Taylor were going to be fired for "whistleblowing."

Shortly after the March staff meeting, King recommended that Cotton and Taylor be given terminal contracts for insubordination. R26-2092. Berry thought King was part of the problem, and that he and Cotton and Taylor had all let personal problems interfere with their work. R29-2875. He knew that King would be leaving soon, and thought there was a good chance that Taylor and Cotton could operate differently under different management. R29-2875. When the issue was brought to the attention of Popovich, she thought that it was important for Gardner to look at the issue fresh, and would not authorize any major personnel changes. R22-1523. King was advised that decisions regarding organizational changes would be left to the new associate vice-president. R26-2094.

6. The Non-renewals

Prior to Gardner's arrival on July 11, 1988, he had heard brief references to personnel problems in academic computing from King. R27-2504, 2512. Gardner specifically denied he had been advised that he would be required to terminate petitioners if he took the job. R27-2509.

Knowing he would have to make decisions about new contracts by the first week of August, Gardner asked that updated resumes and personnel files of all employees who would be reporting to him be made available for his review. R27-2511-12. After he arrived on campus, he spoke to King about Taylor and Cotton. R27-2519-22. King told Gardner about the transfer issue, his dissatisfaction with Taylor's work habits, and his lack

of work ethic. R27-2520. King did not talk about Taylor's whistleblowing activities in 1986. R27-2531. King was very negative about Cotton, and told Gardner that he was arrogant. R27-2522, 2547.

In Gardner's interview with Taylor, he asked Taylor about his professional goals. R27-2529. Taylor advised that he wanted to be director of academic computing in 5 years – a goal Gardner thought unrealistic based on Taylor's resume. R27-2529. Taylor wanted to discuss his whistleblowing activities, and the perceived plot to retaliate against him. R27-2530. Although Gardner told him he was not interested in what had happened in the past, Taylor talked about it anyway. R27-2530. Gardner asked him why he did not accept the transfer to Broward, and Taylor responded that it was inconvenient. R27-2530. Gardner was left with a negative impression, and the perception that if Taylor was asked to do something he did not want to do, he would claim it was in retaliation for whistleblowing, and that no one could make him do it. R27-2531. In essence, he had found a way of granting himself tenure. R28-2601.

When Gardner reviewed Taylor's personnel file, what stood out was Taylor's contention that it was not important that he remain technically current – a position Gardner thought was incredible. R27-2534. Gardner did not see King's file on Taylor which contained the personal counseling notes from 1987 until after the lawsuit was filed. R27-2536. Based primarily on the interview and the personnel file, Gardner determined that Taylor was minimally qualified for the job he had, and that he did not fit into his reorganization plans. R27-2538, 2540. As far as Gardner was concerned, the whistleblowing of 1986 was

a dead issue, and had nothing to do with his decision. R27-2541-42.

Before the interview with Cotton, Gardner received his professional goals which included "being able to admit that I am wrong on those extremely rare occasions when, in fact, I am wrong . . . " R21-1226; R27-2546. This was followed by a list of 20 questions which created the perception that Cotton was going to interview him. R27-2548. Gardner had never seen anything like it, and the list of questions confirmed the abrasiveness and arrogance of which King had spoken. R27-2552. During the interview, Gardner felt that Cotton only wanted to talk about plots and intrigue and hidden agendas, which was repugnant to Gardner. R27-2553. Gardner told him two or three times that he was not interested in the past, and cut him off. R27-2554. Gardner thought that Cotton would not be a productive team player, and made the decision that his contract would not be renewed. R27-2555-56. Gardner did not know that Cotton had ever spoken to the press, and testified that no other defendant had a part in making the decision to issue a terminal contract. R27-2556.[3]

When Gardner asked Popovich for authority to issue terminal contracts to Taylor and Cotton, she did not give him an immediate answer. R27-2560. Gardner was concerned that she would not give him the authority to issue the non-renewals. R27-2561. Popovich ultimately gave

---

[3] Cotton looked at his own personnel file shortly after being notified of the non-renewal, and admitted that there was no "paper trail" in the file which could have influenced Gardner's decision. R21-1222-23.

her approval knowing that it would precipitate a lawsuit because she thought it was important to allow Gardner, as manager, the prerogative to make changes where he thought necessary. R22-1500-01.

7. Snyder's testimony

Adelaide Snyder was the linchpin of petitioners' case. Her credibility was challenged by virtue of the fact that she was forced to retire from her position as Vice-President for University Relations under circumstances which were embarrassing to her. R18-465-69. She was criticized for her ineffectiveness in defending FAU in the daily onslaught of negative press in 1986. R18-496.

Snyder testified that the controversy surrounding the allegations of improprieties was the only topic discussed at some cabinet meetings, and that the issue of how best to get rid of petitioners was also discussed. R28-430-34. She claimed Popovich thought they should find a way to terminate them, and that they could develop sufficient reasons to issue terminal contracts. R18-437-38. Snyder testified there was discussion of "creating a paper trail" which would support such a termination. R18-441.

Snyder claimed the discussions regarding petitioners did not end after Michels and Nicewander resigned, but did arise with less frequency until the point at which discussions regarding hiring a new vice-president for information management began. R18-444-47. According to her, members of the administration discussed the fact that a new position could be created for the purpose of

terminating petitioners without it looking like a continuation of the prior problem. R18-450-55.

Snyder's testimony regarding discussions of a plan to terminate petitioners was refuted by every past and present administration member, and each witness who was in attendance at cabinet meetings. R22-1473-74, 1476, 1480-81, 1484, 1487, 1495, 1498, 1506, 1544; R23-1617-18, 1626-27, 1727; R24-1776-77, 1779, 1782, 1790-91, 1796, 1805, 1866, 1951, 1998; R26-2095-97, 2107, 2126, 2272-74, 2277, 2281; R27-2299, 2304, 2315, 2319, 2415-17, 2429-30, 2509, 2542, 2544-45, 2556; R28-2685, 2700; R29-2769, 2784, 2848, 2876, 2917.

SUMMARY OF THE ARGUMENT

Petitioners proceeded below on a theory of retaliatory conduct, claiming they were unconstitutionally punished for speaking. The jury was properly instructed on the elements of liability under this theory, and the single ruling on jury instructions challenged here does not justify issuance of the writ requested.

Petitioners state that the courts below "ruled" that "a plaintiff must prove that state officials, in taking adverse employment action, *intended* to violate plaintiff's constitutional rights." Petition, p.3. The courts below "ruled" no such thing. Rather, the trial court overruled petitioners' objection to a general, prefatory instruction explaining 42 U.S.C. § 1983 liability. The remainder of the jury instructions which related to the specific deprivation alleged in this case properly informed the jury of the requirements for liability based on retaliatory conduct.

Neither the district court nor the circuit court held that a plaintiff may not use an expert witness on "whistleblowing" in the appropriate circumstance. Under the facts of this case, however, such evidence would not have been of assistance to the jury in resolving the credibility dispute with which it was confronted. The trial court's ruling was a straightforward application of Fed. R. Evid. 702, and does not suggest the need for clarification of that rule by this Court.

ARGUMENT

I. THE JURY INSTRUCTIONS FULLY AND ACCURATELY ADVISED THE JURY OF THE APPLICABLE LAW ON § 1983 LIABILITY BASED ON RETALIATORY CONDUCT; THEREFORE, THE DECISIONS BELOW DO NOT JUSTIFY ISSUANCE OF THE WRIT TO REVIEW THE ISSUE

The jury in this case was instructed on the requirements for liability under a retaliatory discharge theory in accordance with *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977). These instructions were prefaced by a general, preliminary instruction which stated that 42 U.S.C. § 1983 allows a plaintiff to recover from one who "intentionally" violates his constitutional rights. Petitioners' elaborate argument, spun from the single word "intentionally," improperly frames the issue for review in a vacuum.

This case involves allegations of *punishment* for speaking. Plainly, the terms "punishment" and "retaliation" connotate more than negligent conduct. Indeed, the

Second Amended Complaint alleged that respondents' actions were taken to "intentionally hinder, obstruct and injure the Plaintiffs' career advancement within FAU." R1-32-9. Petitioners never contended respondents' actions were anything *less* than intentional. Thus, the preliminary instruction given by the trial court appropriately framed the issues pled, and did not materially affect the outcome of the case. If there is a question to be resolved on the issue of whether only intentional conduct will support a claim under 42 U.S.C. § 1983 for deprivation of First Amendment rights, it simply cannot be reached in this retaliatory discharge case.

Petitioners' argument misstates both the theories of liability and defense which were argued to the jury, and the law on which the jury was instructed. The district court's Omnibus Order on Motions for Directed Verdict puts these theories back into perspective, and provides the context in which the jury instructions must be viewed:

> **DEPRIVATION VS. CONSPIRACY**
>
> The alleged act by which each Plaintiff was deprived of his constitutional rights was the issuance of nonrenewal contracts. The evidence indicates that the nonrenewal contracts were recommended by Defendant GARDNER, approved by Defendant POPOVICH, and signed by George Perkins. Thus, the only name Defendants who could fairly be said to have participated, either directly or indirectly, in the issuance of nonrenewal contracts are GARDNER and POPOVICH. The Court hereby directs a verdict in favor of MICHELS, NICEWANDER,

> FEDERICO [Floyd], and BERRY on the issue of actual deprivation.[4]
>
> These Defendants remain, of course, potentially liable for *conspiracy* to deprive constitutional rights. Conspiracy is, in fact, "the legal mechanism through which to impose liability on each and all the defendants without regard to the person doing the particular act." *Jones v. Bales*, 58 F.R.D. 453, 458 (N.D. Ga. 1972), *aff'd*, 480 F.2d 805 (5th Cir. 1973) (per curiam).

R10-341. Furthermore, in ruling on proposed jury instructions, the trial court noted:

> . . . the instructions make it clear that if the jury finds that Gardner innocently recommended the issuance of non-renewal contracts but Popovich wrongly approved the recommendation to further the pre-existing scheme Popovich and any conspirators will be liable, but Gardner would not be liable.

R30-2988.

The instructions clearly informed the jury that a deprivation of petitioners' civil rights could be found, and the conspiracy issue considered, if petitioners proved the elements of their cause of action "as to *either* defendant [Gardner or Popovich]." R30-3138-41. Moreover, the instructions regarding conspiracy made it clear that other participants could be held liable, assuming the jury found a deprivation, even if Gardner acted innocently. R30-3141-44.

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[4] The directed verdicts in favor of respondents Michels, Nicewander, Floyd and Berry on the issue of actual deprivation were not appealed.

Against this backdrop, petitioners' arguments in support of issuance of a writ of certiorari lose considerable force, if they are not completely eviscerated. Respondents' defense theory did not turn on Gardner's state of mind. Rather, respondents consistently asserted that Gardner's decision to recommend issuance of terminal contracts was not substantially motivated by petitioners' protected speech because the issue of Taylor's whistleblowing (he did not even know of any whistleblowing activity by Cotton) was not of concern to him, and no other respondents played a role in his decision.

The conceptual difficulty in reconciling the notion of "retaliation" with something less than intentional conduct is reflected in petitioners' tortured attempt to demonstrate how the asserted error could possibly have affected the outcome of this case. Pursuant to the instructions given to them on the issue of retaliatory discharge, the jury found that petitioners' claims did not pass the *Mt. Healthy* test; i.e., that their protected speech was not a substantial or motivating factor in Gardner's decision to recommend issuance of the terminal contracts, nor in Popovich's approval of that recommendation. Regardless of whether Gardner knew or did not know of the alleged retaliatory intent of others, the jury's finding that *his* actions did not amount to a deprivation of petitioners' First Amendment rights was amply supported by the evidence.[5] The jury obviously rejected petitioners' contention that there was an "execution order;" therefore, the

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[5] The apparent contention that Gardner's *lack* of knowledge of a supposed plot to terminate petitioners rendered him culpable nonetheless is specious.

argument that the jury could have found that Gardner "recklessly" carried out such an order is without basis.

The jury having determined that petitioners' protected speech was not a substantial or motivating factor in either Gardner's or Popovich's decisions regarding issuance of the terminal contracts, there was no First Amendment deprivation in the terminations. As a result, the allegedly "reckless" conduct of the remaining respondents in "conspiring" to terminate petitioners was rendered irrelevant.

Finally, the suggestion that the respondents "recklessly failed to supervise King" and that Popovich "recklessly failed to supervise Gardner" has never been raised. This theory was not pled, nor was it ever argued as a basis for liability. Thus, the contention that the jury instruction at issue was inconsistent with *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987), to the extent that case discusses supervisory liability, is one which cannot be reached in this case.

A review of the jury instructions as a whole leaves no doubt that the jury was properly instructed on the elements of liability in a retaliatory discharge claim, and that no reversible error occurred. *See Johnson v. Bryant*, 671 F.2d 1276, 1280 (11th Cir. 1982). The jury was given a "clear and concise statement of the law applicable to the facts of the case," which was neither misleading nor confusing. *Hanover Fire Ins. Co. v. Sides*, 320 F.2d 437, 444 (5th Cir. 1963). *See also Samples v. City of Atlanta*, 916 F.2d 1548 (11th Cir. 1990) (instruction which advised the jury that police officer must have acted "knowingly" in order

to establish liability under 42 U.S.C. § 1983 did not confuse issue by suggesting subjective intent to harm, viewing jury charges as a whole). Because the claim pursued by petitioners was that respondents had intentionally retaliated against them for the exercise of their First Amendment rights, the general instruction could not have misled the jury under the facts of this case, nor did it result in a "substantial impairment" of petitioners' right to redress. As a result, petitioners' arguments in favor of issuing the writ of certiorari are without merit.

II. THE DISTRICT COURT'S DISCRETIONARY RULING EXCLUDING THE PROFFERED EXPERT TESTIMONY ON "WHISTLEBLOWING" DOES NOT SUPPORT ISSUANCE OF THE WRIT; THE RULING WAS WITHIN THE TRIAL COURT'S BROAD DISCRETION AND WAS NOT MANIFESTLY ERRONEOUS.

The trial court's exclusion of the testimony of petitioners' proffered expert does not support issuance of the writ requested. Petitioners' argument overlooks the broad discretion with which the trial court is vested in ruling upon evidentiary matters, and ignores the factual and procedural context in which the district court's ruling was rendered. This case does not present a circumstance which calls for clarification of Fed. R. Evid. 702 and 704, nor do the decisions below undermine a plaintiff's ability to prove allegations of unconstitutional retaliatory conduct.

Petitioners tendered "expert" Thomas Devine to testify that the facts of this case fit "classic commonly recognized patterns of whistleblowing, and retaliatory action

taken by defendant . . . " R22-1362. The district court determined that the proffered testimony did not meet the requirements of Fed. R. Evid. 702, and granted respondents' motion *in limine* to exclude the expert testimony. R22-1366-7.

The relevant inquiry under Rule 702 is whether expert testimony will aid the jury in resolving the issues before it. *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 685 (11th Cir. 1984). *See also Little Oil Co., Inc. v. Atlantic Richfield Co.*, 852 F.2d 441, 446 (9th Cir. 1988) (noting that test for admissibility under Rule 702 is whether the jury will receive "appreciable help.") In this regard, petitioners' argument proceeds upon a faulty premise. Under the facts of this case, expert testimony regarding institutional reaction to whistleblowing was *not* "essential" to the jury's understanding of the evidence. Where the jury has before it all the evidence it needs to make its determination, expert testimony is not necessary, and may be properly excluded under Rule 702. *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962).

The jury in this case was called upon to decide a factual dispute; i.e., whether petitioners' protected speech was a substantial or motivating factor in the decision not to renew their employment contracts. Under the facts developed at trial, the issue with which the jury was confronted was purely one of credibility: either they believed Adelaide Snyder when she testified that the respondents actively worked to retaliate against petitioners, or they did not. Resolution of this dispute did not require the assistance of an expert.

In *Salem*, this Court recognized the general rule

> that expert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge "if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation. . . . " *United States Smelting Co. v. Parry*, (CA 8 Utah) 166 F. 407, 411, 415.

The determination of whether an expert's testimony will assist the jury is within the sound discretion of the trial judge. *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052 (4th Cir. 1986).

In this case, there was direct evidence – if the jury chose to believe it – of the premise which petitioners sought to establish. It is the availability of *direct* evidence in this case which serves to distinguish the line of *modus operandi* cases upon which petitioners place primary reliance. For example, there would be no need for such testimony if an eyewitness testified directly that vials and wax paper bags found in the defendant's home were used in running a retail drug operation,[6] or that the availability of sexually explicit photographs in the workplace encouraged him to view and interact with a female co-worker as if she were a sex object.[7] Here, the primary facts were

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[6] *See United States v. Dunn*, 846 F.2d 761 (D.C. Cir. 1988).

[7] *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

presented to the jury in the form of Adelaide Snyder's testimony, and the jury was as capable of understanding and drawing the correct conclusions from those facts as any so-called "expert." *See Williams v. Pro-Tec, Inc.*, 908 F.2d 345, 349 (8th Cir. 1990).

As noted by the trial court, what petitioners sought was to have Mr. Devine present, in the guise of expert testimony, their argument regarding the conclusion the jury should draw from the evidence. R22-1366. An expert's opinion which merely tells the jury what conclusion to reach, however, is not helpful to the jury, and may properly be excluded. *Montgomery v. Aetna Casualty & Surety Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990). *See* Advisory Committee Notes to Fed. R. Evid. 704 (noting that abolition of the ultimate issue rule does not support admission of opinions which merely tell the jury what result to reach).

Petitioners' narrow focus on the trial court's statement that the subject matter was not so "scientific" as to require expert testimony is misplaced. In the first place, the trial court did not limit its remarks in the manner suggested by petitioners. The court also stated: "I don't believe there is any difficulty in presenting this argument to the jury . . . " R22-1367. Regardless of the trial court's terminology, however, it is clear that no *specialized* knowledge was required to resolve the issues in the case. *See Ward v. Westland Plastics, Inc.*, 651 F.2d 1266 (9th Cir. 1980) (issue of whether gender was basis of discrimination not so technical as to require aid of expert testimony).

The Eleventh Circuit Court of Appeals properly held that the trial court's exclusion of the proffered expert

testimony was not manifestly erroneous. *See Barfield v. Orange County*, 911 F.2d 644, 651 n.8 (11th Cir. 1990), *cert. denied sub. nom. Barfield v. Lamar*, 111 S.Ct. 2263 (1991) (exclusion of expert testimony that plaintiff was victim of racial discrimination on grounds that it would not assist trier of fact not abuse of discretion).

The judgment of the circuit court did not amount to a blanket ruling prohibiting the use of "whistleblowing" experts in every case involving a claim of retaliatory discharge. In fact, the rulings below do not at all affect the use of such an expert in the appropriate factual setting. This case simply did not present a circumstance in which such testimony would have been of assistance to the jury, and the district court's discretionary ruling represented a straightforward application of Fed. R. Evid. 702. In the context of this case, this evidentiary ruling does not serve as a basis for invoking this Court's jurisdiction.

CONCLUSION

Based on the foregoing arguments and authorities, this Court is respectfully requested to deny the petition for a writ of certiorari.

Respectfully submitted,

BETSY GALLAGHER *
GAIL LEVERETT
KUBICKI, DRAPER,
GALLAGHER & MCGRANE, P.A.
25 West Flagler Street
Penthouse Suite
Miami, FL 33130
Telephone: (305) 374-1212

Counsel for Respondents Florida Atlantic University, Helen Popovich, Don Gardner and Anthony Catanese

* Counsel of Record

No. 92-1287

In The

Supreme Court of the United States

October Term, 1992

ROBERT TAYLOR and TIMOTHY COTTON,

Petitioners,

vs.

FLORIDA ATLANTIC UNIVERSITY, HELEN POPOVICH, KENNETH MICHELS, DENNIS NICEWANDER, DON GARDNER, MARILYN FLOYD, LEONARD BERRY, and ANTHONY CATANESE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE OF RESPONDENTS, KENNETH MICHELS, DENNIS NICEWANDER, MARILYN FLOYD AND LEONARD BERRY, TO PETITION FOR WRIT OF CERTIORARI

MICHAEL B. DAVIS
DAVIS, ISAACS & YEARGIN, P.A.
The Forum – Suite 1010
1655 Palm Beach Lakes Boulevard
Post Office Box 3797
West Palm Beach, Florida 33402
(407) 478-2400

Attorneys for Respondents, Kenneth Michels, Dennis Nicewander, Marilyn Floyd and Leonard Berry

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

A. Whether, in a claim for deprivation of First Amendment rights by retaliatory discharge, where the Plaintiffs have only alleged intentional deprivation, it was proper for the District Judge to charge the jury that 42 U.S.C. § 1983 provides a remedy to parties suffering such intentional deprivation of rights as that claimed by the Plaintiffs.

B. Whether the District Judge properly exercised his discretion in excluding testimony of a purported expert witness in an area of novel expertise where the Plaintiffs, who proffered the testimony, failed to establish its conformity to a generally accepted explanatory theory.

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No. 92-1287

In The

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RESPONSE OF RESPONDENTS, KENNETH MICHELS, DENNIS NICEWANDER, MARILYN FLOYD AND LEONARD BERRY, TO PETITION FOR WRIT OF CERTIORARI

The Respondents, Kenneth Michels, Dennis Nicewander, Marilyn Floyd and Leonard Berry, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's decision in this case.

I. COUNTERSTATEMENT OF THE FACTS

The case presents a situation where the annual employment contracts of two staff members of a state university were not renewed in 1988 upon recommendation of their supervisor. The reason for the nonrenewal was that the two had become discordant elements in the functioning of their department. The two thereafter initiated litigation against various present and former university administrators in which they claimed that their nonrenewal was a retaliatory act and the result of a conspiracy among the Defendants whose alleged purpose was to punish them for the actions of one of them two years earlier in publicly raising questions about the propriety of certain school purchases. Their claim was considered and rejected in a jury trial.

Florida Atlantic University (FAU) was a state school established in Boca Raton, Florida, in 1963 and which steadily expanded more than tenfold over the next 25 years. As a result of this growth, the administrative organization was frequently restructured to reflect expanding needs (R: 29-2762). At the time in issue (1985-1988), the university hierarchy was organized with three vice-presidents serving under the university president: the Academic Vice-President and Provost, the Administrative Vice-President, and the Vice-President for University Relations and Development. Each had charge of a separate sphere of university administration.

The Plaintiffs, Robert Taylor and Timothy Cotton, had been employed by FAU in the early 1970's to work in the school's computer operations (R: 18-634; R: 20-1048). Over the years, these operations expanded and, in 1983,

they were divided according to function: the academic computing department was created and reported through its director ultimately to the Academic Vice-President and Provost; the administrative computing department reported ultimately to the Administrative Vice-President (R: 24-1920-3; R: 17-367-8). Shortly after this functional division, Taylor and Cotton transferred to the academic computing department where their ultimate supervisor below the President was the Academic Vice-President and Provost (R: 29-2924; R: 20-1048; R: 24-1922). Despite earlier disciplinary problems, Taylor rose to the position of associate director of academic computing under William King, the departmental director. At the time, Kenneth Michels was Academic Vice-President (R: 29-2924; R: 19-642; R: 24-1924).

In late 1985, a school purchasing clerk received a requisition for a GMS microcomputer and printer from the Dean of Business School, as a sole source purchase[1] (R: 20-997). She questioned whether the printer could not be replaced with a listed model and consulted Taylor (R: 19-659; R: 20-997-8). Taylor's function in respect to computer purchases was solely to determine the technical compatability between a new item and the school's existing equipment; he had been given no charge to determine the propriety of purchase requests (R: 19-665). The propriety of such requests was the responsibility of the

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[1] Goods are usually purchased on competitive bidding or under standing, pre-negotiated contracts. When an item is only obtainable from a sole source, its purchase may be authorized even though it is neither bid nor listed as a pre-negotiated item (R: 28-2663-5).

administrative sphere and, ultimately the Administrative Vice-President who, at the time, was Dennis Nicewander (R: 28-2663-5).

Taylor, nonetheless, entertained doubts as to the propriety of the request as a sole source purchase; he discussed the matter with his superior, King, and the two of them raised the issue in February, 1986, at a meeting of the University computer advisory committee. This committee operated functionally within the academic sphere and the assistant academic vice-president who chaired the meeting advised King and Taylor that the matter was not within the committee's area of responsibility, but appropriately resided with administrative affairs (R: 19-660; R: 24-1944). Taylor, contrary to Petitioners' suggestion, did not "disapprove" the purchase; rather, he signed his approval certifying the machine's compatability (R: 19-665). Eventually Nicewander, who had never been told that anyone questioned the propriety of the purchase and who reviewed a number of purchase requests each day, perfunctorily approved the purchase (R: 28-2663-4).

When a second requisition for the same model computers was made by the Business School Dean (but this time, the requisition was for a competitive bid), Taylor and a faculty member from the Business School, John Munson – whose application for promotion had just been rejected by the Dean – decided to question anew the acquisition since several Business School faculty members reportedly worked for the computer manufacturer (R: 15-119; R: 22-1478). Rather than raising the issue with the Administrative Vice-President, they decided that Munson would present the matter to the State Attorney (R: 19-674, 682). This was done in September, 1986 (R:

15-144-152). Although Academic Vice-President Michels had had no involvement in the computer purchase request or its approval, Taylor and Munson suggested in a written submission to the State Attorney that he was involved (R: 17-198). At trial, Munson candidly admitted that his goal was one of vengence – seeking the removal of Dean Luing and Michels for denying his promotion (R: 17-189, 202).

After a thorough and confidential investigation, the State Attorney found no violation of state law or other impropriety within his sphere of concern and forwarded his information to the Chancellor of the State University System for determination of whether any department regulations had been violated (R: 17-340). The Chancellor assigned the task of further investigation to a system auditor, Harvey Sweeney; Sweeney found no evidence of violations by the school administrators of ethical or administrative rules, but he issued a report in late September, 1986, which was critical of upper-level management's supervision of mid-level management (R: 17-282, 306). The Chancellor directed the University President, Helen Popovich, to prepare a plan to correct supervisory deficiencies (R: 22-1455). Subsequent to the receipt of Sweeney's report, Popovich called a meeting of all those involved as proponents or targets of the charges in an effort to resolve any remaining issues[2] (R: 22-1442). The meeting was not successful.

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[2] Although Taylor was in attendance, Cotton was not. There was no evidence of significant involvement by Cotton in the events of 1986; none of the school administrators had knowledge of such involvement (R: 22-1480, 24-1782, 24-1951, 28-2686).

In early November, 1986, articles began appearing in the local news media which distorted and sensationalized the findings of Sweeney and the State Attorney. As a result of continual press coverage of the matter, several employees in the purchasing department complained to the administration that direct contacts by reporters were involving substantial amounts of their time; as a consequence, the Administrative Vice-President, Nicewander, issued a memorandum addressed only to the senior staff in administrative affairs which advised that all press contacts should be through upper management (R: 22-1452; R: 28-2686, 2688)[3]. This memorandum was withdrawn the day it was issued after the Vice-President for University Relations, Adelaide Snyder, registered her objection with the President (R: 22-1453).

As a result of continued press coverage, much of it increasingly critical of Nicewander and Michels, the ability of both to effectively function was impaired and, in early December, 1986, Popovich asked for, and received, their resignations (R: 23-1548). They both took lengthy sabbaticals before returning the following year to teaching positions; after early December, 1986, neither was involved in school administration or attended cabinet meetings (R: 23-1608; R: 27-2427; R: 28-2652, 2698; R: 22-1467)[4].

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[3] This memorandum on its face only affected the staff in administrative affairs; it could have no effect upon Taylor or Cotton who were within the sphere of academic affairs and were not answerable to Nicewander.

[4] Snyder testified at trial that there had been discussions at cabinet meetings attended by Michels and Nicewander about retaliating against Taylor and Cotton. It was shown, however,

After the resignations of Michels and Nicewander, the controversy of 1986 died out; by 1988, it was relatively ancient history (R: 15-174).

In 1987, King developed a plan to reorganize the expanded department of academic computing which had doubled in size and was about to open a branch in Broward County (R: 24-1952; 29-2762). Where previously all staff had reported to King through Taylor, King's reorganization provided for two assistant directors who, together with Taylor (who remained the associate director), split the supervision of the staff and departmental functions; Taylor continued to serve as acting director in King's absence (R: 24-1953-5). One of the two new assistant director's position was filled by Cotton, who was promoted accordingly (R: 24-1953-5).

Almost immediately, Taylor chaffed under the new structure and generally ignored the restructured chain of command; while he and King remained personal friends[5], friction between them began to surface (R: 24-1956-7).

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that Cotton had not been actively involved in the matter prior to December, 1986 and, in any event, his involvement, if any, was not known to the school administrators prior to Michels and Nicewander's leaving the cabinet. Testimony from the various members of the cabinet at that time, besides the school administrators who were defendants, established that there was no such discussion (R: 23-1617; R: 24-1776; R: 26-2272; R: 27-2300). It was demonstrated that Snyder, who had been demoted and then resigned under Popovich's successor, harboured embittered feelings toward the school administration. Her charges had not been made prior to her demotion.

[5] King had been an ally in the so-called "whistleblowing" events of 1986.

King attempted to communicate verbally and, when that proved of no avail, he sent Taylor personal counselling notes which were not placed in Taylor's personnel file (R: 24-1962-9). Taylor responded, acknowledging that personal problems were affecting his job performance and attitude (R: 24-1978-80). When a dramatic and tempestuous confrontation between Taylor and a fellow staff member – who was then his girlfriend and roommate – exploded before students and staff, King decided that some further steps needed to be taken (R: 24-1998-2003). At that time, a temporary vacancy among the managerial staff of academic computing in Broward County provided King the opportunity to transfer Taylor to the satellite campus until matters cooled down (R: 24-2007)[6]. Although the transfer did not affect Taylor's position or functions (which were not site specific), Taylor refused the move, giving as a reason the inconvenience of a 20-minute commute (R: 29-2777-8). King, who began to view this as a challenge to his authority, became insistent; Cotton weighed in on the side of Taylor, and memoranda arguing the move and motivation of the parties began to circulate on the computer mailboard (Def. Ex. 70; R: 26-2041, 2044, 2066). Taylor appealed the transfer to Marilyn Floyd, the Assistant Vice-President for Academic Affairs and King's superior, and then to Leonard Berry, the new Vice-President for Academic Affairs (R: 29-2860). The appeal was initially denied but, upon the intervention of President Popovich, a resolution was achieved

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[6] Cotton, who had supervision of academic computing on the Broward campuses under King, asked the latter to make a temporary assignment (R: 24-2007).

whereby a staff member from another department filled the vacancy (R: 29-2779).

Taylor and Cotton were not satisfied that King had finally backed down from his position under administrative pressure, but began to circulate additional memoranda within the department criticizing King and the new appointee (R: 26-2066, 2044; R: 26-2054-5). The situation became a virtual "civil war" within the department (R: 21-1189). When Berry called a departmental meeting in an effort to quench the flames of discord, Taylor and Cotton took the opportunity to heap personal invective upon King (R: 29-2865-6; R: 20-861). Significantly, at trial, both Cotton and Taylor confessed shame over the character and tenor of their conduct (R: 21-1221, 1236; R: 20-861).

During this time frame, the University, in response to a study, was in the process of combining academic and administrative computing under the supervision of the newly-created position of Associate Vice-President for Information Resource Management who would report directly to the President (R: 29-2787; R: 18-540). The new position was filled, after an extensive national search, by Don Gardner (R: 20-864). King, meanwhile, resigned to take a position with the state legislature (R: 29-2836). When Gardner came on board on July 11, 1988, he was advised by the personnel director that his first order of business would be to review the annual contracts of all administrative and professional staffers in his department which were up for renewal (R: 27-2511-2). He set about to interview all of the A & P personnel in his department, including Taylor and Cotton. While he had learned a few details of the spring imbroglio involving

Taylor, Cotton and King, he determined to make up his own mind as to the suitability of Taylor and Cotton to function within the new reorganization of computer operations at the school (R: 27-2540-2). His interview with Taylor and Cotton did nothing to convince him that they could work with the needed harmony in the new structure; on the contrary, they demonstrated by their arrogance and attitude that they would be as troublesome a pair of subordinates to Gardner as they had been to King (R: 27-2529-2530, 37; R: 27-2546-7, 2552-4). Gardner, on his own and with no outside influence, decided not to renew their contracts; he also decided at the same time not to renew the contracts of certain A & P staffers in administrative computing (R: 27-2556, 2561). His decision was finally approved by President Popovich after some delay.

II. REASONS FOR DENYING THE PETITION

Review by certiorari is not a matter of right, but of judicial discretion. It should be granted only where there are special and important reasons for doing so. Sup. Ct. R. 17.1. The Petition presents no basis for such review. On the contrary, the decision below was correct and should not be disturbed.

A.

1) THE PLAINTIFFS ONLY ALLEGED AND OFFERED EVIDENCE TO PROVE INTENTIONAL DEPRIVATION OF CONSTITUTIONAL RIGHTS AND RAISED NO ISSUE IN THE PLEADINGS OR PROOF OF NON-INTENTIONAL DEPRIVATION.

The District Judge's jury charge on the elements necessary to establish the claims alleged by the Plaintiffs

under 42 U.S.C. § 1983 was particularized to the nature of the asserted claims and properly set forth the law as it applied to those claims.

The case proceeded to trial upon the claims set forth in the first two counts of the Second Amended Complaint (R: 1-32; Appendix 7a-19a; the references hereinafter to specific paragraphs are found at these pages in the Appendix). In the general allegations, the Plaintiffs alleged that the Defendants had engaged in a "continuing pattern or practice of discrimination and retaliation" (paragraph 34) and that the Defendants, Popovich, Michels, Nicewander, Floyd and Berry "unlawfully agreed and conspired . . . to intentionally hinder, obstruct and injure the Plaintiffs' career advancements . . . " (paragraph 35). In Count I, which asserted the claim for deprivation of rights under the First Amendment, the Plaintiffs alleged that all of the Defendants, alone and in concert, "unlawfully did punish Plaintiffs' lawful exercise of their rights to free association, speech and press . . . " (paragraph 38); that the Defendants' "unlawful actions were designed to humiliate and embarrass Plaintiffs . . . " (paragraph 40); that the action of Defendant, Popovich, "was specifically designed and calculated to teach Taylor, Cotton and other 'whistleblowers' . . . a lesson about the consequences of speaking out . . . " (paragraph 41); that the Defendants' actions were "wanton, reckless, willful, malicious *and* constituted a deliberate abuse of their official powers . . . " (paragraph 42; emphasis added).

In Count II, which attempted to state a claim for deprivation of a property interest without due process[7],

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[7] The nature of the Plaintiffs' employment was such that they had no property interest in the reappointment to their

the Plaintiffs reasserted the general allegations and alleged that the refusal to reappoint Taylor and Cotton to their positions was based on the exercise of their First Amendment rights.

It is plain from a review of this pleading that the allegations consistently aver purposeful, intentional conduct by all of the Defendants aimed at retaliating against Taylor and Cotton for having been "whistleblowers". All of the allegations which describe the supposed conduct of the Defendants clearly portray actions which could only be intentional[8].

Beyond the allegations, the Plaintiffs' evidence suggested only deliberate and intentional conduct constituting an alleged conspiracy, the purpose for which was to punish the Plaintiffs[9].

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non-tenured positions. They attempted to construct a property interest predicated upon a state regulation – Rule 6 c 5 – 5.010(3)(b), *Florida Administrative Code*, which provided that a failure to reappoint an employee "shall not be based on constitutionally impermissible grounds". The Plaintiffs theorized that such a rule created something more than a unilateral expectation in continued employment.

[8] This is true even of the one paragraph (paragraph 42) which characterizes the degree of egregiousness of the alleged conduct. While one of the terms – "reckless" – might, if used alone, suggest less than intentional conduct, it is instead conjoined with the phrase "constituted a deliberate abuse" and within this context can only imply purposeful and intentional action.

[9] Of course, the Plaintiffs' evidence was subject to question and their contentions were rejected in their entirety by the jury.

Recognizing the nature of these claims, the District Judge prefaced his jury instructions accordingly:

> In this case, plaintiffs Taylor and Cotton each claim that defendants Gardner and Popovich, while acting under color of state law, intentionally deprived him of his constitutional rights under the Constitution of the United States.
>
> (R: 30-3138; Appendix 1a).

He then continued with the language objected to by the Plaintiffs:

> The law provides that a person may sue in this Court for an award of money damages against anyone who, under the color of any state law or custom, intentionally violates the plaintiff's rights under the Constitution of the United States.
>
> (R: 30-3139; Appendix 1a-2a).

Considered together with the description given earlier of the nature of the Plaintiffs' claims, it is clear that the latter comment by the District Judge did no more than inform the jury that, if the Plaintiffs' claim were proven as made, then Federal law provided a remedy. The Court then proceeded to lay out the elements necessary to establish a claim under 42 U.S.C. § 1983:

> In order to prove their claim against an individual defendant, therefore, each plaintiff must prove by a preponderance of the evidence each of the following facts: First, that the acts of the defendant were under color of authority of the State of Florida; second, that the plaintiff's exercise of his protected First Amendment rights

> was a substantial or motivating factor in the defendant's participation in a decision to issue nonrenewal contracts to the plaintiff; and third, that the defendant's acts were the proximate or legal cause of damages sustained by the plaintiffs.
>
> (R: 30-3139; Appendix 2a).

In setting forth the essential elements needed to prove a claim, the Court did not suggest that a claim could only be established if the conduct of the Defendants was intentional. Nor can this instruction, drawn as it is from this Court's decision in *Mt. Healthy City School Dist. Board of Education v. Doyle,* 429 U.S. 274, 50 L.Ed. 2d 471, 97 S.Ct. 568 (1977), be seriously objected to by the Petitioners. By focusing on a single sentence in the jury charge and presenting it divorced from the context in which it was made, the Petitioners have simply distorted the nature and the import of the overall jury charge in this case. Considered in its entirety, it is obvious that the instructions given in this case do not present the issue suggested for review by the Petitioners.

2) THE CIRCUITS ARE NOT CURRENTLY IN SUBSTANTIAL CONFLICT OVER THE STATE OF MIND REQUIREMENT FOR CLAIMS OF RETALIATORY FIRST AMENDMENT DEPRIVATION UNDER 42 U.S.C. § 1983 AND THIS COURT'S EXISTING PRECEDENT PROVIDES ADEQUATE AUTHORITY TO GUIDE RESOLUTION OF THE ISSUE.

The Petitioners' contention that the various Circuits are in conflict over the state of mind requirement for

claims brought under 42 U.S.C. § 1983 for violation of First Amendment rights is unconvincing. They rely principally upon two Circuit opinions and one District Court opinion as establishing authority for the proposition that a negligence-based claim is sufficient. *Foley v. Alabama State Bar*, 648 F.2d 355 (5th Cir. 1981); *Lowe v. Letsinger*, 772 F.2d 308 (7th Cir. 1985), and *Boussom v. City of Elkhart*, 567 F.Supp. 1382 (N.D. Ind. 1983). All three of these decisions derive from the now receded-from dicta in *Parratt v. Taylor*, 451 U.S. 527, 686 L.Ed. 2d 420, 101 S.Ct. 1908 (1981) and precede the opinions of this Court in *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed. 2d 662, 106 S.Ct. 662 (1986); *Brower v. County of Inyo*, 489 U.S. 593, 103 L.Ed. 2d 628, 109 S.Ct. 1378 (1989), and *Wilson v. Seiter*, ___ U.S. ___, 115 L.Ed. 2d 271, 111 S.Ct. 2321 (1991). It cannot be seriously contended that they represent the current status of the law in those Circuits and District. Furthermore, a careful reading of *Foley* demonstrates that the Court assumed, but did not decide, that a claim predicated upon negligent denial of First Amendment liberties is actionable. There is no indication in the opinion that the negligence-founded basis of the claim was ever challenged by the defendant. In *Lowe*, a case involving a criminal defendant's claim of conspiracy between a judge, a court clerk and the state attorney general to conceal notice to him of a ruling upon a motion for postconviction relief, the only discussion of a negligence-founded claim is contained in that portion of the opinion considering the claim against the attorney general. After rejecting the conspiracy count against the attorney general for failure of the complaint to allege that defendant's knowledge (noted by the Court as an essential element of such a claim), the Court also

rejected an individual action claim – predicated on an alleged misrepresentation to the Federal Court of the status of the postconviction proceeding in state court – for failure of the complaint to allege that the attorney general had a duty to inquire as to the status of the proceeding. In the course of its discussion, the Court noted that state officials had been held liable in actions brought under 42 U.S.C. § 1983 for negligent conduct. In support, it cited *Parratt* and two Courts of Appeals' decisions – *Crawford v. Edmonson*, 764 F.2d 479 (7th Cir. 1983) and *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976). Neither case implicated a First Amendment right: *Crawford* involved Fourth and Eighth Amendment rights (and held that while 42 U.S.C. § 1983 contained no state of mind requirement, the particular right alleged to be violated might), and *Bonner* involved Fourth Amendment rights. Indeed, it is not clear in *Lowe*, itself, as to the nature of the Constitutional right allegedly violated by the attorney general's action. It appears most likely to have been a due process right under the Fourteenth Amendment.

The Petitioners also cite *Caballero v. City of Concord*, 956 F.2d 204 (9th Cir. 1992) as holding that claims under 42 U.S.C. § 1983 do not require proof of intent. *Caballero* involved a claim of violation of Fourth Amendment rights rather than First Amendment rights. Although the decision in *Caballero* may be difficult to reconcile with this Court's holding in *Brower*, supra, the present cause is obviously not the vehicle to remedy the Ninth Circuit's misunderstanding of the necessary elements in a Fourth Amendment claim.

Finally, the Petitioners point to two unpublished opinions – *Livesay v. Dawson*, No. 90-6647, 923 F.2d 848

(table) (4th Cir., Jan. 25, 1991), and *Walker v. Tennessee Dept. of Corrections*, No. 90-5075, 924 F.2d 1060 (table) (6th Cir., Jan. 31, 1991) – as holding that claims under 42 U.S.C. § 1983 for violation of First Amendment rights may be predicated on negligence[10]. *Walker* makes no such holding. The Court of Appeals affirmed, upon different grounds, a magistrate's dismissal of a complaint based upon an allegation of negligent denial of First Amendment rights. The Appellate Court simply noted that the authority relied upon by the magistrate, *Daniels*, supra, implicated Fourteenth rather than First Amendment rights and, therefore, was not apposite precedent. Only *Livesay*, of all the Circuit precedents cited by the Petitioners, holds that a negligent violation of First Amendment rights is actionable. In doing so, it cites to pre-*Daniels* authority.

Significantly, in view of the analytical methodology utilized by this Court in *Wilson v. Seiter*, supra, for determining the state of mind requirement sufficient to produce a constitutional deprivation (and, hence, an actionable claim under 42 U.S.C. § 1983), none of the cases cited to by the Petitioners as holding that negligence suffices to constitute a deprivation of First Amendment rights involves a claim brought for retaliatory conduct[11].

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[10] It is perhaps noteworthy that rules in both the Fourth Circuit (4th Cir. I.O.P. 36.6) and the Sixth Circuit (6th Cir. Local Rule 24), discourage the citation of unpublished opinions as precedential authority.

[11] In *Wilson*, this Court noted that the Eighth Amendment proscription against cruel and unusual *punishment*, by the very implication of the term *punishment*, could not be violated by

When the charge given to the jury in this case is considered in its context and in light of the allegations and evidence, it is clear that this case does not present the issue for review urged by the Petitioners. A careful examination of the authorities cited by the Petitioners fails to establish a serious present conflict between the Circuits upon the issues presented in cases involving the precise nature of the claim involved in the present case. These Respondents respectfully suggest that no basis for certiorari review is presented by Petitioners' first issue.

B.

THE DISTRICT JUDGE'S RULING ON THE PLAINTIFFS' PROFFER OF TESTIMONY BY AN ALLEGED "WHISTLEBLOWER" EXPERT WAS A PROPER EXERCISE OF DISCRETION.

During the course of the trial, the Plaintiffs sought to use the testimony of Thomas Devine, an attorney frequently representing plaintiffs in "whistleblower" suits, who was purported to be an expert in the field of "whistleblowing". The Plaintiffs announced that Devine's testimony would be to the following effect: the time lag

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negligent or other non-deliberate conduct. Similarly, in the case of *retaliatory* firing of an employee for the exercise of free speech rights protected under the First Amendment, the fact that the very nature of the violation supposes deliberate conduct in the form of retaliation – the return of like for like; repayment in kind; requital; reprisal – argues strongly that an element of intent or purposefulness is essential to the establishment of a claim for such violation. Thus, claims for First Amendment deprivations not predicated on retaliatory actions are of little value in assessing the essential elements for a claim of this type.

between Taylor's claimed "whistleblowing" in 1986 and his termination in 1988 was consistent with patterns of retaliation; retaliation against "whistleblowers" is often made by others than the person who was the target of the "whistleblowing"; King's actions were supportive of a scheme to retaliate against Taylor, and a common institutional tactic taken by administrators is to pursue such action as will cause a "whistleblower" to become frustrated in his job and then act in such ways as would justify the planned retaliatory measures (R: 22-1360-1365).

The Plaintiffs made no effort to lay a predicate for the introduction of expert opinion evidence in this admittedly novel area of expertise. No showing was made or attempted that would have established the reliability or scientific acceptability of observations of behavioral patterns and phenomena relating to "whistleblowing" and institutional responses to "whistleblowing". The District Judge properly rejected the proffer, noting that the proposed subject of the opinion testimony was "not so scientific as to require expert testimony".

In the case of *Sterling v. Velsical Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988), the Sixth Circuit set forth a four-part test for the admissibility of expert opinion testimony under Rule 702:

> In accordance with Rule 702, a four-part test must be met to uphold the admission of "expert testimony": 1) a qualified expert 2) testifying on a proper subject 3) *which is in conformity to a generally accepted explanatory theory* 4) the probative value of which outweighs its prejudicial effect.

. . .

> With respect to the third criterion, the principles upon which the scientific evidence is based must be sufficiently established to have gained wide acceptance in the field to which it belongs.
>
> (id. at 1208) (emphasis added).

Sterling's third criterion is a broadened statement of the test first enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Such a test recognizes that not everything purporting to be scientific, technical or otherwise the subject of specialized knowledge is sufficiently valid to achieve threshold admissibility as evidence. See also *Mercado v. Ahmed*, 756 F.Supp. 1097 (N.D. Ill. 1991). The lower courts have been confronted with a wide array of subjects which one or another party in litigation has sought to present through the medium of an "expert witness"; in some instances, the proffering party has established the acceptability of the subject within the relevant technical or scientific community; in others, valid analogy between the proffered subject and another accepted subject has been found sufficient; in other instances, the subject has been rejected as not a proper one for expert opinion evidence. See cases collected in M. Graham, *Federal Practice and Procedure*, § 6644 (Interim Edition), ftn. 6-8. This Court has previously noted that District Courts have wide discretion in admitting and excluding expert testimony. *Hamling v. United States*, 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887 (1974). Considering the wide range of issues and considerations involved and the virtually limitless scope of matters which might be a candidate for recognition as subjects of expert testimony, it is clear that the subject is wisely left to the discretion of

the District Judges to be worked out on a case-by-case basis with appropriate review in the Courts of Appeal.

In the present action, the District Judge properly exercised his discretion in rejecting the proffered evidence since the Plaintiffs laid no predicate to establish that Mr. Devine's anecdotal reflections and musings were in conformity to a generally accepted explanatory theory. The Petitioners have suggested that these opinions were simply another form of *modus operandi* evidence. Such evidence is traditionally admitted where the actions in question are related to observed patterns of conduct of the same actor or to patterns of conduct associated with those who, it has been established with sufficient reliability, share such conduct. Thus, where patterns of conduct have been reliably observed and associated with particular criminal endeavors or with members of a criminal subculture who share certain behavioral patterns [*United States v. Resto*, 824 F.2d 210 (2d Cir. 1987) – role of a steerer in street drug operations; *United States v. Solis*, 923 F.2d 548 (7th Cir. 1991) – use of beepers by drug traffickers; *United States v. Anderson*, 851 F.2d 384 (D.C. Cir. 1988) – role of pimps handling prostitutes; *United States v. Jackson*, 425 F.2d 574 (1970) – tactics of pickpockets], the Courts have generally allowed *modus operandi* testimony for it is then reasonable to associate the conduct or actions of the one who is the subject of such testimony with those of the studied group and to explain and provide meaning to the former's conduct and actions in light of what has become known and established about conduct and actions of the latter. In the present case, the Plaintiffs simply failed to establish that institutional

administrators are recognized to constitute a social subgroup whose shared conduct, actions and tactics recur with sufficient reliability and predictability to warrant the admission of opinion testimony on the subject to be used as a paradigm to provide explanation and meaning to the conduct of the Defendants. The burden of establishing the underlying scientific or technical basis of expert evidence is on the proponent of such evidence. *United States v. Gwaltney,* 790 F.2d 1378, 1382 (9th Cir. 1986). The Plaintiffs' efforts to portray a constitutional dimension to the District Judge's ruling are unavailing. The true issue is simply whether the Plaintiffs, who had the burden of establishing the proper basis for use of expert evidence, met that burden. The answer is equally simple: they did not.

As with the first issue raised by the Petitioners, this second issue fails to present grounds upon which certiorari should be granted.

III. CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

MICHAEL B. DAVIS
DAVIS, ISAACS & YEARGIN, P.A.
The Forum – Suite 1010
1655 Palm Beach Lakes Boulevard
Post Office Box 3797
West Palm Beach, Florida 33402
(407) 478-2400

Attorneys for Respondents, Kenneth Michels, Dennis Nicewander, Marilyn Floyd and Leonard Berry

EXCERPTS FROM THE D.C. TRIAL TRANSCRIPT

* * *

[p. 3138] In this case plaintiffs Taylor and Cotton each claim that defendants Gardner and Popovich, while acting under color of state law, intentionally deprived him of his constitutional rights under the Constitution of United States. Specifically, each plaintiff claims that while defendants Gardner and Popovich were acting under color of authority of the State of Florida as representatives of Florida Atlantic University they intentionally violated the plaintiffs' constitutional rights; namely, that they were deprived of their rights under the First and Fourteenth Amendments of the Constitution when Gardner recommended and Popovich approved that Cotton and Taylor be issued nonrenewal or terminal contracts because of these plaintiffs' exercise of their rights of free speech.

Under the First and Fourteenth Amendments of the Constitution of the United States, every citizen has the right to freedom of speech, which includes the right to [p. 3139] speak about matters of public concern. No public employer may terminate an employee for exercising this right.

For purposes of this case, you are instructed that the following acts of speech, and no others, are constitutionally protected: First, plaintiff Taylor's comments to newspapers, the State Attorney's Office and Mr. Sweeney; second, plaintiff Cotton's comments to newspapers; and third, Cotton's nomination and public support of Taylor.

The law provides that a person may sue in this Court for an award of money damages against anyone who,

under color of any state law or custom, intentionally violates the plaintiff's rights under the Constitution of the United States.

In order to prove their claims against an individual defendant, therefore, each plaintiff must prove by a preponderance of the evidence each of the following facts: First, that the acts of the defendant were under color of authority of the State of Florida; second, that the plaintiff's exercise of his protected First Amendment rights was a substantial or motivating factor in the defendant's participation in a decision to issue nonrenewal contracts to the plaintiff; and third, that the defendant's acts were the proximate or legal cause of damages sustained by the plaintiffs.

In this case the parties have stipulated or agreed [p. 3140] that the defendants Gardner and Popovich acted under color of state law and you should, therefore, accept that fact as proven.

In order to prove that his speech activities were a substantial or motivating factor in defendant Gardner's decision to recommend or defendant Popovich's decision to approve that a nonrenewal contract be issued, a plaintiff does not have to prove that the protected speech activities were the only reason the defendants acted against him. It is sufficient if the plaintiff proves that his protected speech activities were a substantial consideration that made a difference in the defendant's decision.

Finally, for a defendant's acts to be the proximate or legal cause of damages it must be shown that, except for such conduct, the damages would not have occurred

Causation can be established by direct personal participation or by participation in setting in motion a series of acts by others which the actor knew or reasonably should have known would cause others to inflict constitutional injuries to third parties.

If you find in either plaintiff's favor with respect to each of the things he must prove you must then decide whether the defendants have shown by a preponderance of the evidence that the plaintiff would have been issued a nonrenewal contract for other reasons, even in the absence [p. 3141] of the protected speech activity. If you find that the plaintiff would have been issued a nonrenewal contract for reasons apart from the speech activity then your verdict should be for the defendants.

If you find in either plaintiff's favor with respect to each of the things he must prove as to either defendant and further find that a defendant has not proven that the plaintiff would have issued a nonrenewal contract for other reasons than the defendant has deprived the plaintiff of his constitutional rights and you must next consider the claim of conspiracy. Otherwise, the plaintiff has not deprived, has not been deprived of his constitutional rights, and you need not consider the claim of conspiracy, because where there has been no deprivation of constitutional rights there can no liability for conspiracy.

Each plaintiff has claimed that defendants Gardner, Popovich, Michels, Nicewander, Federico and Berry participated in a conspiracy to deprive his right to free speech. In order to prove this claim, each plaintiff must prove by a preponderance of the evidence each of the following facts: First, that there existed a conspiracy;

second, that the purpose of the conspiracy was to deprive the plaintiff of his constitutional right to free speech by issuing him a nonrenewal contract.

[p. 3142] A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. So a conspiracy is a kind of partnership in which each member becomes the agent of every other member. The essence of a conspiracy is a combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and may have discussed some common aims and interests is not necessarily proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be or the details thereof or the means by which the object or purposes were to be accomplished. In order to establish that a conspiracy existed, the plaintiff must show that members of the conspiracy in some way or manner or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not show that all the means or methods employed to carry out the alleged [p. 3143] conspiracy were agreed upon, nor that all means or methods which were agreed upon were actually used or put into operation, nor that all persons alleged to have

been members of the claimed conspiracy were members of such conspiracy.

In this suit each plaintiff alleges that the defendants Gardner, Popovich, Michels, Nicewander, Federico and Berry are co-conspirators. There can be no conspiracy unless one, unless more than one person is involved, but it may be that not all the persons charged with being conspirators are, in fact, conspirators. In order to succeed a plaintiff does not have to show you that every one of the named defendants joined in the conspiracy, but he does have to show that at least one of those named defendants conspired with at least one other named defendant.

One may become a member of a conspiracy without full knowledge of all of the details of the conspiracy. On the other had, a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.

Before you may find that a defendant has become a member of a conspiracy it must be shown by a preponderance of the evidence that the conspiracy was knowingly formed and that the defendant who is claimed to have been a member [p. 3144] knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate knowingly means to act or participate voluntarily and intentionally and not because of mistake, accident or other innocent reason. A defendant may be found liable as a conspirator even though he or she may have played only a minor part in the conspiracy.

If you find that either plaintiff has proven all of the elements of a conspiracy then you must find all those defendants who were members of the conspiracy to be liable for damages done to the plaintiff in issuing him a nonrenewal contract, even if one or more of the defendant conspirators did not himself take the action to issue the plaintiff a nonrenewal contract.

If you find that either plaintiff has failed to prove any of the elements of a conspiracy then you must find in favor of the defendants on this claim.

If you find for either plaintiff and against any defendant as to a deprivation of or a conspiracy to deprive free speech rights then you must decide the issue of that plaintiff's damages.

* * *

SECOND AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

CASE NO.: 89-8046-CIV-PAINE

ROBERT TAYLOR and TIMOTHY
COTTON,
Plaintiffs,

vs.

FLORIDA ATLANTIC UNIVERSITY,
HELEN POPOVICH, KENNETH
MICHELS, DENNIS NICEWANDER,
DON GARDNER MARILYN FLOYD
and LEONARD BERRY,
Defendants.

_____/

SECOND AMENDED COMPLAINT

Introduction

1. This action challenges the constitutionality of Defendants' actions in harassing and retaliating against the Plaintiff Robert Taylor for his whistleblowing concerning improprieties and illegalities by Florida Atlantic University (FAU) staff and administration. In addition, this action challenges the constitutionality of Defendant's actions in harassing and retaliating against Timothy Cotton for his support and association with Robert Taylor. This action also challenges the constitutionality of the Defendants' actions in terminating both of the Plaintiffs for exercising their First Amendment rights of free speech by criticizing the University administration. Plaintiffs

seek injunctive and declaratory relief, compensatory and punitive damages from the Defendants.

Jurisdiction

2. Jurisdiction of this Court is invoked pursuant to 28 USC Section 1343, providing for jurisdiction without regard to the amount in controversy in cases seeking redress from alleged infringement of civil rights; pursuant to 28 USC Section 1331, providing for jurisdiction in cases arising under the Constitution and laws of the United States; and pursuant to 28 USC Sections 2201 and 2202, providing for declaratory and injunctive relief. This case arises under the First, Fifth and Fourteenth Amendments to the United States Constitution and 42 USC Section 1983, which creates a federal cause of action for violations of these constitutional rights. The court also has jurisdiction over the other claims pursuant to the doctrine of pendent jurisdiction.

Parties

3. FAU is a state university and is part of the state university system located in Boca Raton, Florida, created by the Florida Board of Regents. FAU is a defendant in this lawsuit only to the extent that injunctive and declaratory relief is sought as to the federal claims and for all purposes as to the state Whistleblower claim.

4. Plaintiff Robert Taylor is a resident of Palm Beach County, Florida. At all times material to this action Robert

Taylor was the Associate Director of Academic Computing for Florida Atlantic University (FAU). Taylor has been employed with the University for more than fifteen years.

5. Plaintiff Timothy Cotton is a resident of Broward County, Florida. At all times material to this action, Timothy Cotton was the Assistant Director of Academic Computing for FAU "Tower" in Broward County. Cotton has also been employed with the University for more than fifteen years.

6. The individual defendants described in paragraphs 7 through 11 are sued in their individual as to Counts I and II and in both their individual and official capacities as to Count III.

7. At all times material hereto, defendant Helen Popovich was the President of FAU and responsible for operation and administration of the University.

8. Defendant Ken Michels was the University Provost and was responsible to the President for administration of academic affairs and any other duties designated by the President at all times material hereto. Defendant Michels was replaced by Defendant Leonard Berry.

9. Defendant Dennis Nicewander was the Vice President for Administrative Affairs, who was responsible to the President for business affairs and any other duties designated by the President at all times material hereto. Defendant Nicewander was replaced by George Perkins.

10. Defendant Don Gardner is the Vice President for Information Resource Management who was responsible for issuing the termination contracts to the Plaintiffs Robert Taylor and Timothy Cotton.

11. Defendant Marilyn Floyd is the Assistant Vice President.

12. At all time material hereto, defendants were acting under color of state law and caused the constitutional and statutory deprivation complained of herein.

FACTS

13. In November of 1985, the Dean of the College of Business, Gary Luing ordered computer equipment initially approved by Defendant Nicewander, Administrative Vice President. Plaintiff Taylor who was responsible for approving any computer purchases, questioned the order because the order was never competitively bid and was to be purchased from a company that apparently employed faculty members of the College of Business.

14. Upon further investigation through 1986, Plaintiff Taylor and others discovered other improprieties and apparent illegalities in the method used by certain staff and administrative personnel involving: 1) the purchase of nine personal computers; 2) the acquisition of mobile homes; 3) travel agent acquisitions, and 4) physical property controls.

15. In August of 1986, Plaintiff Taylor received the largest raise in his department for his outstanding work and contributions to the Academic Computing Department. Taylor had been with the University almost fifteen years.

16. In September of 1986, John Munson, Chairman of the Computer and Information Resources Department, went to the Palm Beach County State Attorney's Office

with the information uncovered by Plaintiff Taylor. Munson had earlier attempted to bring the information to University Administration's attention but was thwarted in those attempts.

17. On September 22, 1986, Plaintiff Taylor was asked by the State Attorney's Office to participate in its investigation. Taylor agreed and supplied them with information he had obtained.

18. In October of 1986, the Internal Auditor Director of the State of Florida's Board of Regents also requested Taylor's participation in an investigation into the improprieties and illegalities mentioned above.

19. On October 9, 1986, Plaintiff Taylor was accosted by Defendant Provost Michaels and was told the University was now aware of Taylor's participation in the State Attorney's Office investigation that Taylor could be fired for giving out information about the University and that he had made a "big mistake" talking to the State Attorney's Office.

20. In late October 1986 the Internal Auditor Director in conjunction with the State Attorney issued his report concerning the above described improprieties and concluded that leadership had not been provided by administration; that there had been improper allocation of resources; poor management; inadequate supervision; and circumvention of normal procedures by academic personnel to acquire and receive goods.

21. In November of 1986 Plaintiff Taylor spoke privately to Defendant President Popovich and then to the

press when Popovich failed to act regarding his continued concern over improper actions by some members of the administration, and in particular Defendant Vice-President Nicewander.

22. The issue of the misappropriation of funds and Defendant Popovich's response to it was the subject of considerable discussion by the public and in the news media.

23. Shortly thereafter, Defendants Nicewander and Popovich then issued a memo to Taylor and others effectively prohibiting them from speaking to the press or otherwise exercising their First Amendment rights in an attempt to deter Taylor from publishing future statements about the University.

24. In 1987, Taylor received the lowest raise in his department and Assistant Vice President Floyd advised that "Taylor is going to be fired. We would have done it sooner but it was too close to his whistleblowing."

25. In March of 1987, Plaintiff Timothy Cotton sent a memo to Acting Academic Vice-President nominating plaintiff Taylor and others to receive the University's Distinguished Service Award for Taylor's roles in exposing corruption in the University. Throughout the remainder of his employment with the University, Plaintiff Cotton was a vocal supporter of Plaintiff Taylor's activities.

26. Furthermore, Plaintiff Cotton was quoted in several newspaper articles criticizing the administration's lack of interest in FAU's Broward Tower facility. In particular, Cotton accused the administration of being afraid to

take any action regarding the Tower because of the shake-up in administration precipitated by Taylor's whistleblowing. Cotton was asked to chair an ad hoc committee on computing at the Tower that suggested in a report that the administration was the cause for problems at the Tower.

27. Despite the fact that Plaintiff Cotton was repeatedly recommended for promotions and pay raises, in 1987, his supervisor told him that he was unable to secure raises for subordinates who "spout off".

28. In February of 1988, Plaintiff Taylor, without warning or explanation, was reassigned to the Broward County branch of FAU. Plaintiff Cotton tried to intercede on Taylor's behalf to prevent the transfer.

29. In February of 1988, Cotton received a phone call from his supervisor that made Cotton suspect that his job was in jeopardy unless he stayed out of the picture on Taylor's job transfer.

30. Cotton called Defendant Berry to complain about his supervisor's statements on February 26, 1988 and was told "It certainly sounds to me like they are trying to shut you up."

31. In July of 1988, FAU hired Defendant Don Gardner as Vice President for Information Resource Management, a newly created position.

32. After a thirty minute meeting with Taylor in July of 1988, Defendant Gardner advised Taylor that he would not be reappointed in August of 1989 when his contract expired.

33. After a thirty minute meeting with Cotton in August of 1988, Defendant Gardner advised Cotton that he would not be re-appointed in August of 1989 when his contract expired. No explanation for the decision to terminate Taylor and Cotton has ever been given by the University, except that Taylor and Cotton no longer "fit into the plan" at FAU after over thirty years of combined service to the University in Academic Computing. Furthermore, both were repeatedly assured that their "performance was not to blame."

34. The Defendants, through their past and present harassment, their discriminatory and retaliatory attempts to transfer and then terminate; and their general terms and conditions of employment, have engaged in a continuing pattern or practice of discrimination and retaliation which has taken place in the past and will continue until their contracts expire in August of 1989.

35. The Defendants, Popovich, Michels, Nicewander, Floyd and Berry unlawfully agreed and conspired under color of state law to intentionally hinder, obstruct and injure the Plaintiffs' career advancement within FAU to wit:

a. Defendant Nicewander, when he discovered that Taylor was questioning his approval of purchase orders, began to create a scenario whereby Taylor appeared to be a "troublemaker" and "malcontent" within the University.

b. During the following months, Nicewander initially enlisted the assistance of Popovich, Michels and Floyd to help in denying Plaintiffs Taylor and Cotton

work opportunities and harass Plaintiffs in the workplace in furtherance of the conspiracy.

c. Thereafter, with the full knowledge and/or approval of Defendants Popovich, Michels and Nicewander enlisted the aid of others within the administration including Defendant Berry to portray Taylor and Cotton in an unfavorable light.

d. When Defendant Gardner was being hired, Plaintiffs believe and therefore aver that he was directly or indirectly told by the Defendants above to fire Taylor and Cotton.

36. Taylor and Cotton have complied with all conditions precedent prior to filing this action as required by Fla. Admin. Code Sec. 6C5-5.010.

Count I

(Deprivation of First Amendment Rights)

37. Plaintiffs reallege every allegation contained in paragraphs 1 through 36 above as though fully set forth herein.

38. By means of such actions outlined above, all the defendants listed above, acting alone and in concert unlawfully did punish Plaintiffs' lawful exercise of their rights to free association, speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution.

39. Defendants' unlawful actions have interfered with Plaintiff's ability to exercise their rights as citizens

and concerned members of a University in dire need of strong and capable leadership.

40. Defendants' unlawful actions were designed to humiliate and embarrass Plaintiffs and to cause others in the academic community to shun them, and to cause Taylor and Cotton anxiety, distress and hardship.

41. The action of Defendant Popovich, through the other Defendants, in issuing Taylor and Cotton terminal contracts was specifically designed and calculated to teach Taylor, Cotton and other "whistleblowers" in the University system a lesson about the consequences of speaking out about the disgraceful lack of management and control as confirmed by several separate and independent studies of FAU.

42. Defendants actions were wanton, reckless, willful, malicious and constituted a deliberate abuse of their official powers to violate Plaintiff's First and Fourteenth Amendment rights. Defendants actions are particularly offensive in view of the supposed purpose of a university to encourage the free dissemination and discussion of ideas and methods to improve society.

43. As a direct and proximate result of these actions, Plaintiffs sustained great mental and emotional distress and damage to their ability to earn a living in excess of $10,000.

44. Plaintiffs are further entitled to punitive or exemplary damages in excess of $10,000.

45. Plaintiffs are further entitled to an injunction restraining Defendants' from in any manner terminating Plaintiffs from their position with FAU or otherwise

impairing their ability to work. Plaintiffs have no adequate remedy at law and an injunction is their only means of securing complete relief. Plaintiffs are suffering and will continue to suffer irreparable injury from Defendants' actions alleged above, unless such actions are enjoined by this court.

Wherefore, the Plaintiffs request this court to provide Plaintiffs with all the relief permitted by Federal law including, but not limited, to:

a) Reinstatement of Taylor and Cotton to the same positions held before the adverse action was commenced or to equivalent positions;

b) Reinstatement of Taylor and Cotton's full fringe benefits and seniority rights;

c) Compensation for lost wages, benefits and other seniority rights;

d) Payment of reasonable costs, including attorney's fees;

e) Issuance of an injunction by this court prohibiting the Defendants from their present and anticipated future retaliatory conduct;

f) Compensatory damages for the mental and emotional distress caused Robert Taylor and Timothy Cotton and for their inability to earn a living in excess of $10,000.

g) Punitive damages in excess of $10,000.

h) Any other relief the court deems appropriate.

Count II

(Violation of Fourteenth Amendment to Due Process)

46. Plaintiffs reallege every allegation contained in paragraphs 1 through 36 above as though fully set forth herein.

47. Rule 6c5-5.010 (3)b, Fla. Admin. Code provides that: " The decision not to offer further appointment to an employee shall not be based on constitutionally impermissible grounds."

48. Rule 6c5-5.010 (3) b, Fla. Admin. Code creates a liberty or property interest in not being refused reappointment based on constitutionally impermissible grounds.

49. The refusal to reappoint Robert Taylor and Timothy Cotton was substantially based on Robert Taylor and Timothy Cotton's exercise of their First and Fourteenth Amendment Rights.

Wherefore, the Plaintiffs request this court to provide them with all the relief permitted by the Whistleblowers Act of 1986 (Fla. Stat. Sec. 112.3187) and Federal law including, but not limited to:

a. Reinstatement of Taylor and Cotton to the same positions held before the adverse action was commenced or to equivalent positions;

b. Reinstatement of Taylor and Cotton's full fringe benefits and seniority rights;

c. Compensation for lost wages, benefits and other seniority rights;

d. Payment of reasonable costs, including attorney's fees;

e. Issuance of an injunction by this court prohibiting the Defendants from their present and anticipated future retaliatory conduct;

f. Any other relief the court deems appropriate.

Count III

Sec. 112.3187 (Fla. Stat. 1986)
(Whistleblower Act of 1986)

50. Plaintiffs reallege every allegation contained in paragraphs 1 through 36 above as though fully set forth herein against defendant FAU.

51. As set forth in "Statement of Facts" above, Taylor was and is an employee of the state university system who has in the past and at present been the victim of adverse personnel action by the administration at FAU for his disclosure of information to the State Board of Regents' Auditor and to the State Attorney's Office.

52. The information requested by and disclosed to the Auditor and State Attorney's office by Taylor was true and concerned suspected acts of malfeasance and misfeasance and neglect of duty by FAU's administration and staff as outlined in the Statement of Facts.

53. All prerequisites for filing this claim under Fla. Stat. Sec. 112.3187 have been complied with and Plaintiff, Robert Taylor has exhausted all administrative remedies prior to bringing this action.

Wherefore, the Plaintiffs request this court to provide them with all the relief permitted by the Whistleblowers Act of 1986 Sec. 112.3187 (Fla.Stat. 1986) and federal law including, but not limited, to:

a) Reinstatement of Taylor and Cotton to the same positions held before the adverse action was commenced or to equivalent positions;

b) Reinstatement of Taylor and Cotton's full fringe benefits and seniority rights;

c) Compensation for lost wages, benefits and other seniority rights;

d) Payment of reasonable costs, including attorney's fees;

e) Issuance of an injunction by this court prohibiting the Defendants from their present and anticipated future retaliatory conduct;

f) Any other relief the court deems appropriate.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Clark W. Smith, Barristers Building, Suite 500, 1615 Forum Place, West Palm Beach, FL, 33401 this 16th day of August, 1989.

/s/ W. Trent Steele
W. TRENT STEELE, ESQUIRE
Cooperating Attorney for
ACLU of Florida
Palm Beach Chapter
301 Clematis Street
Suite 200
West Palm Beach, FL 33401
407-659-2036 659-2009

Supreme Court, U.S.
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No. 92-1287

In the
Supreme Court of the United States
October Term, 1992

ROBERT TAYLOR and TIMOTHY COTTON
Petitioners,
v.
FLORIDA ATLANTIC UNIVERSITY,
HELEN POPOVICH, KENNETH MICHELS,
DENNIS NICEWANDER, DON GARDNER,
MARILYN FLOYD, LEONARD BERRY,
and ANTHONY CATANESE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

JAMES K. GREEN
One Clearlake Centre
250 Australian Ave. S.
Suite 1300
W. Palm Beach, FL 33401
(407) 659-2009

M. DAVID GELFAND*
TERRY E. ALLBRITTON
KENNETH J. SERVAY
Appellate Advocacy Program
Tulane Law School
6801 Freret Street
New Orleans, LA 70118
(504) 865-5732, 865-5965

Counsel for Petitioners

**Counsel of Record*

LIST OF INTERESTED PARTIES

The parties to the proceeding below were petitioners, Robert Taylor and Dr. Timothy Cotton, and respondents, Helen Popovich, Kenneth Michels, Dennis Nicewander, Don Gardner, Marilyn Floyd, Leonard Berry, Anthony Catanese, and Florida Atlantic University ("FAU"). FAU is a public university of the State of Florida under the Florida Board of Regents. All of the individual respondents were sued in their official and individual capacities, except for respondent Catanese, who was sued in his official capacity only, being substituted on April 12, 1991, for respondent Popovich in her official capacity. None of the petitioners are corporations subject to the requirements of Supreme Court Rule 29.1.

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Supplemental Statement of the Facts

Respondents seek to marginalize this case as an isolated factual dispute resolved by a jury, with no overriding issues of importance. Certainly, this case involved conflicting evidence. Here, however, the significance of this case as a precedent is enhanced -- not undermined -- by the underlying factual disputes. The erroneous legal rulings below demonstrate the broad impact of "isolated" errors by federal courts upon the law generally. How can any jury correctly evaluate disputed evidence when they are given erroneous instructions concerning the elements of a First Amendment claim? Likewise, how can a jury intelligently weigh conflicting evidence when the lower courts, in violation of the rules of evidence, exclude clearly admissible expert testimony explaining the *modus operandi* in such cases? Thus, the issues presented, while important to this case, also have broad significance beyond this case and merit the issuance of a writ of certiorari.

Though purported conflicts in the parties' statements have little significance to the issues presented, respondents' statements contain inaccuracies that should be corrected. First, respondents Michels, Nicewander, and Berry ["Michels respondents"] and Florida Atlantic University, Popovich, Gardner, and Catanese ["FAU respondents"] incorrectly suggest that Taylor approved of the Gulfstream Micro Systems ["Gulfstream"] computer purchase. Michels Reply, 4; FAU Reply, 4-6 . Although Taylor did approve the *compatibility* of the computer, he did not give general approval to the purchase; indeed, he expressed his disapproval to his superiors. He spoke to John Morak, who would normally evaluate the propriety of such purchases, and Morak then refused to sign the approval. Nicewander (Morak and Taylor's supervisor) later approved the purchase while Morak was on vacation (R19, 669-72).

Second, respondents incorrectly state that petitioners did not try FAU internal routes before going to the State Attorney. Michels Reply, 4. In fact, Taylor first reported the improper Gulfstream purchase to FAU's Computer Advisory Committee and then told a trusted co-worker, Dr. Munson, who told FAU's Administration (R19, 664-66; R17, 231-33). Taylor, Cotton and Munson went to the State Attorney only after both the Advisory Committee *and* the Administration ignored their reports.

Third, respondents claim that State Attorney Valentine found nothing improper, and then he turned the investigation over to the Florida Board of Regents' Internal Auditor Director Sweeney, who compiled a report on his own. Respondents incorrectly allege that the report contained no lawful or ethical violations. Michels Reply, 5; FAU Reply, 7. Also, respondents claim that FAU's reorganization and the resignations of Michels and Nicewander resulted from bad press, and not from the report. Michels Reply, 6; FAU Reply, 8-9. However, Valentine found improprieties sufficient to turn over the investigation to Sweeney. Sweeney and Valentine then compiled a *joint report*, which concluded, *inter alia*, that there had been an improper allocation of resources, poor management, inadequate supervision, and most importantly, circumvention of normal procedures by academic administrative personnel in acquiring goods (R17, 273-84, P.Ex. 25).[1] President Popovich asked for Nicewander's and Michels' resignations as a direct result of serious improprieties

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[1] The Michaels respondents admit "the report ... was critical of upper-level management's supervision of mid-level management." Michaels Reply, 5.

publicized by the *joint report*, and ultimately, by the press. The attempt by FAU administration to suppress the publication of Taylor's charges with a "gag order" demonstrates the gravity of the charges and their implications (R18, 424-26; R19, 778-79; R28, 2687-88).

Finally, respondents fail to mention that most of Taylor and Cotton's speech was deemed by the district court to be protected under the First Amendment (a ruling which respondents did not appeal). *See* Petition, 13 and n.3.

REBUTTAL ARGUMENT

I. The Decisions Below Substanitally Impair § 1983 Redress for Violations of First Amendment Rights by Improperly Interposing An Intent Element

A. The Importance Of The "Intent" Charge

Respondents do not contest that the district court's jury charge included "intent" as an element of a § 1983 claim. However, they argue that no error resulted, because petitioners' accusations were based on intentional conduct.

Respondents, however, have ignored that petitioners' allegations and evidence also averred guilt by lesser degrees of culpability, such as reckless indifference. The erroneous "intent" instruction came early in the jury charge: the district court instructed the jury that to find defendants liable, they must find the defendants had "intentionally" violated the plaintiffs' rights. Petition, 17a. This intent instructions permeated all elements of the ensuing § 1983 charge, in direct violation of this Court's prior rulings that "intent" is not required under § 1983.

Respondents further argue that the "intent" jury instruction is harmless, because "the instructions regarding conspiracy made it clear that the other participants could be held liable, assuming the jury found a deprivation, even if Gardner acted innocently." FAU Reply, 20. This argument ignores the part of the conspiracy charge which instructed the jury that they still must "find in plaintiffs' favor *with respect to each of the things he must prove as to either defendant*... Otherwise, ... you need not consider the claim of conspiracy." Petition, 18a. Thus, the jury was instructed that intent was one of "the things [plaintiffs] must prove as to either defendant" to establish a conspiracy. *Id.*

Respondents also argue that the intent charge was justified because non-intentional acts were not included in the pleadings. FAU Reply, 18-19; Michels Reply, 11-14. However, the pleadings *did include* a conspiracy charge, which, by definition, includes non-intentional acts, such as a reckless and callous failure to investigate (*i.e.*, by Gardner) or to supervise (*i.e.*, by Michels, Nicewander and Popovich). There is no necessity to plead each of these non-intentional acts separately.

Furthermore, the harm from the intent charge was exacerbated by the court's refusal of petitioners' requested instruction on withdrawal from conspiracy (R30, 2994-96). A conspirator can withdraw from the conspiracy only by "[t]aking affirmative action to defeat or disavow its purpose." *United States v. Diaz*, 662 F.2d 713, 716 (11th Cir. 1981). Michels and Nicewander claimed withdrawal as a defense (R27, 2428-29, 2432-34; R28, 2693-96). While the burden of proving withdrawal should have rested on Michels and Nicewander, the improper intent instruction,

coupled with the refusal of a withdrawal instruction, shielded these respondents from liability. Petition, 14.

Similarly, the harm inflicted by intent instructions magnified the district court's failure to include an "innocent intermediary" instruction. Gardner detailed how he refused to listen to Taylor or Cotton about their whistleblowing and subsequent retaliation, as proof that he was not involved in the retaliation. FAU Reply, 14-15. However, an innocent intermediary instruction would have explained that Michels and Nicewander could have been held responsible, even if Gardener was innocent. *United States v. Lester*, 363 F.2d 68, 73 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967). *See also United States v. Giles*, 300 U.S. 41 (1937). Without such an instruction, the jury was forced to conclude incorrectly that Gardner's "ignorance" of the conspiracy (*i.e.*, his lack of intent) in recommending termination shielded him from liability, and that Michels and Nicewander, who created bad will towards petitioners, could not be held responsible either.

Furthermore, Gardner could have been held liable under the correct jury instruction. Gardner's self-imposed ignorance of the past shows a callous indifference towards any conspiracy to terminate petitioners. FAU Reply, 14. Correctly instructed, *i.e.*, minus the intent element, the jury could have found that the protected speech was a substantial, motivating factor in the terminations. Gardner cannot intentionally ignore facts which should have prompted him to investigate. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989). The intent instruction improperly "stacked the deck" against plaintiffs, precluding the jury from evaluating respondents' liability.

B. The Split Among The Circuits On State Of Mind

Respondents assert that there is no split among the circuits regarding intent as an element of a § 1983 claim. Michels Reply, 14-18. Yet, they also inconsistently criticize the clear ruling in *Caberello v. City of Concord*, 956 F.2d 204, 206-07 (9th Cir. 1992), that violation of § 1983 does *not* require intent, calling it a "misunderstanding in the necessary elements in a Fourth Amendment claim." Michels Reply, 16. Respondents' discussion of *Caberello* admits and highlights the divergence among the circuits on the § 1983 state of mind requirement. Also, they cite no Supreme Court authority holding that intent is an element of a First Amendment violation. This issue, therefore, merits the grant of a writ of certiorari.

C. Parratt Has Not Been Totally Overruled

Respondents claim that the *Parratt v. Taylor*, 451 U.S. 527, 686 (1981), holding that § 1983 contains no intent requirement, is no longer binding, because subsequent opinions do impose an intent requirement. Michels Reply, 15, *citing Daniels v. Williams*, 474 U.S. 327 (1986), *Brower v. County of Inyo*, 489 U.S. 593 (1989), and *Wilson v. Seiter*, 111 S.Ct. 2321 (1991). But, none of the prisoner cases they cite have overruled *Parratt* to impose intent as a general element of a claim under § 1983.

In *Daniels*, this Court only "overrule[d] *Parratt* to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." 474 U.S. at 330-31. *Brower* involved a § 1983 claim that police officers violated plaintiff's Fourth Amendment right against

unreasonable search and seizure. Nothing in *Brower* interposes intent as a requirement of either the Fourth Amendment or § 1983. Finally, in *Wilson*, a prisoner claimed an Eighth Amendment violation. While *Wilson* addressed intent as related to an Eighth Amendment violation, *Wilson*, 111 S.Ct. at 2322, it created no general intent requirement under § 1983. Thus, respondents' assertion that *Parratt* is "now receded-from dicta," Michels Reply, 15, is patently false.

D. The Intent Charge Reaches Beyond This Case

Though lower courts have differed on whether § 1983 or the First Amendment require an element of intent, *see* Petition, 15-20, this Court has never so held. Thus, the significance of the legal ruling below extends beyond this case; it provides a basis for future courts to shield retaliatory conduct by incorrectly heightening the plaintiff's burden of proof.

The adverse impact of the "intent" charge herein illustrates the impact of the ruling below. If intent is interposed as an element of plaintiff's proof, plaintiff's difficult burden becomes nearly impossible to meet. It sanctions retaliatory conspiracies under the guise of recklessness or indifference. *See* Petition, 20-22. It chills the free exercise of speech on matters of public importance, *i.e.*, public corruption and waste, in direct contravention of the First Amendment goal of encouraging such free speech. *See* Petition, 19. By adding an intent element, the courts below have undermined First Amendment rights and perverted § 1983 requirements. This departure from established law and the divergent views of the circuits provide a substantial basis for granting a writ of certiorari.

II. The Evidentiary Rulings Below Improperly Prohibit Use of Expert Witnesses in Establishing Patterns and Practices of Retaliation

Respondents argue that the trial court's exclusion of the testimony of Thomas Devine, a nationally prominent expert on whistleblowing and retaliatory responses, was merely an isolated exercise of permissible discretion. However, the exclusion of Devine's testimony was much more; the district court's own reasons demonstrate that it was based on fundamental misconceptions concerning the type and scope of evidence admissible under Fed.R.Evid. 702 and 704. *See* Petition, 23-24. The significance of the lower court's error is that it approves an inappropriately narrow construction of the type of experts who can testify and the scope of their testimony.

Devine's *modus operandi* testimony would have provided a context for the seemingly innocent and isolated facts. In excluding this testimony, the court ruled that: (1) it was not sufficiently scientific; (2) testimony concerning patterns in other cases and resulting conclusions are outside the scope of the rules; (3) the testimony was inadmissible because it reached an ultimate conclusion.

First, the district court judge erred in stating that the testimony would not be sufficiently "scientific" to come within the scope of the rule. The Advisory Committee's Notes to Rule 702 state that the test is whether use of the expert will assist the trier of fact: "The fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical' *but extend to all 'specialized' knowledge*." Fed.R.Evid. 702 Advisory Committee's Notes (emphasis added). *See also* Petition, 23-24.

Second, the ruling below unduly narrows the scope of expert testimony. Devine's proposed "modus operandi" testimony does not differ from other such testimony that has been uniformly admitted. Thus, the erroneous ruling below impacts the law by narrowing the scope of expert testimony in contravention of the plain language of the Rules, the Advisory Committee Notes, and the jurisprudence. *See* Petition, 25-26, and authorities therein.

This impact is demonstrated by this case. Without an expert to decipher the underlying culture, whistleblowing retaliatory conduct in the academic setting may seem as innocent as patterns of illegal narcotics activity (*United States v. Dunn*, 846 F.2d 761 (D.C. Cir. 1988)), or of illegal securities practices (*Vucinich v. Paine, Webber, Jackson, & Curtis, Inc.*, 803 F.2d 454 (9th Cir. 1986)) do without expert testimony. In fact, university administrative culture is better established than criminal culture, with its own dress code, language, annual conventions, journals and newsletters, *and code of conduct*. *See* FAU Reply, 10 (characterizing Taylor as "blue collar mentality"). There is nothing "scientific" about expert testimony regarding illegal narcotics dealing or security trading practices. However, under the rulings below, testimony regarding these cultures also would be patently inadmissible.

Third, the lower courts' ruling that expert testimony on ultimate facts is inadmissible directly conflicts with Fed.R.Evid. 704. The Advisory Notes clearly state that Rule 704 *abolished* the prior rule prohibiting such testimony. Also, this Court has stated: "Rules 702-705 permit experts to testify in the form of an opinion, and without any exclusion of opinions on 'ultimate issues.'" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988). The rulings

below substantially, incorrectly, and impermissibly narrow the scope of the Federal Rules of Evidence. The importance of this error merits granting a writ of certiorari.[2]

CONCLUSION

For the foregoing reasons, petitioners Taylor and Cotton submit that this Court should grant their petition to issue a writ of certiorari to the Eleventh Circuit.

Respectfully submitted,

JAMES K. GREEN
One Clearlake Centre
250 Australian Ave. S.
Suite 1300
W. Palm Beach, FL 33401
(407) 659-2009

*Counsel of Record

M. DAVID GELFAND*
TERRY E. ALLBRITTON
KENNETH J. SERVAY
Appellate Advocacy Program
Tulane Law School[**]
6801 Freret Street
New Orleans, LA 70118
(504) 865-5732, 865-5965

Counsel for Petitioner

[**]The assistance provided by Teresa DeCastro and James Siemens, law clerks in the Appellate Advocacy Program, is gratefully acknowledged.

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[2] Finally, respondents argue that because Adelaide Snyder testified regarding her first hand knowledge of *some* retaliatory events, an expert would not assist the jury. FAU Reply, 24. This argument is meritless. There is no rule that prohibits expert testimony merely because a fact witness also testified. Without an expert's interpretation of such testimony, particularly "pattern and practice" testimony, the jury may not recognize certain conduct as illegal.